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IN THE

Supreme Court of the United States

RONALD WILLIAMS, *et al.*,
Petitioners,

v.

NICOLAS MARSCH, III,
Respondent.

On Petition for Writ of Certiorari to the California Court of Appeal

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When, as here, a reviewing court has determined that a $45,000,000 punitive damages award is based on improper considerations or is otherwise the result of passion and prejudice, does it violate the procedural component of the Due Process Clause for the court arbitrarily to reduce the punitive damages award by remittitur to fifteen percent of the defendant's net worth rather than to remand for a new trial?

2. Does a punitive damages award of $28,155,000, which exceeds by five times the amount in any reported California case, violate the substantive component of the Due Process Clause, where, as the California Court of Appeal held here, the state did not have "any elevated or specific public interest" that would justify a heightened level of punitive damages in a commercial dispute between a 90 year old individual and his sophisticated business partner, in which both parties were found to be guilty of misconduct?

THE PARTIES

Petitioners, who were defendants and appellants in the proceedings below, are Ronald Williams, who is a 90 year old individual; The Ronald Williams Living Trust; and Palo Alto Town & Country Village, Inc. Ronald Williams is the trustee of his living trust and is the president and sole shareholder of Palo Alto Town & Country Village, Inc. Palo Alto Town & Country Village, Inc. does not have any parent or subsidiaries. In this petition, as in the opinion and rulings below, petitioners shall be referred to collectively as "Williams," or as "petitioner."

Respondent, who was plaintiff and respondent in the proceedings below, is Nicolas Marsch, III, an individual. In this petition, as in the opinion and rulings below, respondent shall be referred to as "Marsch" or "respondent."

There were no other parties to the proceedings below.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

None of the opinions or orders at issue in this case is reported. An opinion in the case that pre-dates the trial which produced the punitive damages award at issue here is reported at *Marsch v. Williams*, 23 Cal.App.4th 250 (1994).

JURISDICTION

On April 28, 1997, the California Superior Court for the County of San Diego entered judgment against petitioner after a jury trial for $11,500,000 in compensatory damages and $45,000,000 in punitive damages. App., *infra*, 33a-42a. On appeal, the California Court of Appeal, Fourth Appellate District, issued its opinion on January 20, 1999, in which it ordered that the punitive damages award be vacated unless respondent consented to a reduction of the award from $45,000,000 to $28,155,000.

App., *infra*, 2a-26a. Petitioner timely petitioned the Court of Appeal for rehearing, which was denied on February 9, 1999. App., *infra*, 27a. Petitioner then timely petitioned the California Supreme Court for review. Review by the California Supreme Court is discretionary. The California Supreme Court denied petitioner's petition for review on April 14, 1999. App., *infra*, 1a.

Petitioner believes that 28 U.S.C. section 1257(a) confers jurisdiction on this Court to review on a writ of certiorari the order of the California Court of Appeal affirming the judgment of the trial court conditioned only on a reduction of the punitive damages award to $28,155,000.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due process of law * * *."

STATEMENT OF THE CASE

This case arises out of a partnership dispute between two sophisticated real estate developers. The jury awarded $45,000,000 in punitive damages against petitioner on grounds the California Court of Appeal held to be impermissible. Petitioner asked for a new trial, at least on punitive damages. However, the Court of Appeal allowed respondent to avoid a new trial by accepting a reduction of the punitive award to $28,155,000, an amount the court arrived at by reducing the jury's award to 15 percent of petitioner's net worth, on the ground that this would not "destroy" petitioner. The result is that no trier of fact ever fixed any amount of punitive damages based on permissible considerations. The Court of Appeal found

that no public interest justified a heightened award in this case, yet the amount it selected is significantly higher, both in absolute terms and as a proportion of petitioner's net worth, than any punitive award previously upheld in California history.

A. *The La Jolla Partnerships Trial—Compensatory Phase.* In 1986, Williams paid Marsch $5,000,000 to acquire 50 percent interests in two real estate partnerships that owned a retail mall and an office building in La Jolla, California (the "La Jolla partnerships"). App., *infra*, 3a-4a, RT 1075-77.[1] Five years later, the buildings were sold in bankruptcy and both parties lost all they had invested. RT 2537-40, 2672-75. Marsch claimed at trial that Williams had wrongfully caused the partnerships' failure by refusing to agree to either a sale or refinancing of the properties. RT 1024-25, 1086-87, 1094-96, 1119-27, 2982-85. The jury agreed, and awarded Marsch $11,500,000 in compensatory damages, based on Marsch's expert's view of how much more valuable Marsch's original $5,000,000 share would have become had Williams not caused the partnerships to fail. App., *infra*, 34a-36a, RT 2997. On Williams' cross-claims against Marsch, the jury found Marsch liable for breach of fiduciary duty, breach of contract and conversion, and awarded Williams $555,100. App., *infra*, 38a-39a.

Marsch's theory for why Williams resisted selling or refinancing the La Jolla buildings was that Williams hoped that by putting financial pressure on Marsch in the La Jolla partnerships he could further his ends in another and more valuable real estate partnership between the same parties called Horizon Properties ("Horizon"). According to Marsch, Williams' overall scheme in both the

[1] The designation "RT ——" refers to the Reporter's Transcript of the trial below.

Horizon and La Jolla partnerships was to keep Marsch financially strapped so that Williams could force Marsch to sell his Horizon interest to Williams for less than its fair value. App., *infra*, 14a, 46a. Marsch used evidence of this "Horizon motive" both to provide a motive for his version of disputed facts in the La Jolla transactions and, later, as the entire focus of his punitive damages case in the La Jolla partnerships trial. Indeed, over Williams' continuing objections, approximately 40 percent of the evidence Marsch presented at the La Jolla partnership trial related not to the La Jolla partnerships but to Williams' alleged misconduct in the Horizon partnership.

Despite all the Horizon evidence, Marsch was not, in theory, seeking to recover for misconduct in or damage to the Horizon partnership, but only for misconduct in and damage to the La Jolla partnerships. Marsch's claims for misconduct in and damage to the Horizon partnership had previously been submitted to binding arbitration, and the resulting arbitration award had been confirmed by judgment and upheld on appeal. App., *infra*, 47a.

B. *The Horizon Partnership Arbitration And Sale.* In the Horizon partnership, Marsch and Williams owned several hundred acres that they were developing as a golf course and luxury home sites. App., *infra*, 45a-46a. However, their relationship broke down, and they submitted their disputes to arbitration. In the Horizon arbitration, Marsch contended that Williams was motivated from the outset of the parties' relationship by a scheme to acquire Marsch's Horizon interest for less than its fair market value. AA 02909.[2] The arbitrators disagreed, finding that Williams cooperated in good faith in the early years of the parties' relationship. *Id.* However, two of the

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[2] The designation "AA ——" refers to the Appellants' Appendix in the appellate proceedings below.

three arbitrators found that at some point in mid-1988, Williams did decide that he wanted to buy Marsch out on Williams' terms, that the way to do this was to keep Marsch in a financially strapped situation, and that Williams therefore delayed completion of the Horizon project. AA 02925.

Williams' attempt to acquire the Horizon project on his terms was not successful. However, the panel majority found that project delay attributable to Williams resulted in approximately $48,500,000 in damages to the Horizon partnership. AA 02927. The award held Williams liable for these delay damages. The award also held that the partnership owed Williams approximately $70,500,000 for cash that he had advanced to the partnership. AA 02903-02904. In addition, the award held that Marsch owed Williams $5,000,000 and the partnership $888,190. AA 02892.

The arbitrators ordered that the Horizon partnership be dissolved and its property sold by a receiver. AA 02929-02930. The panel rejected Marsch's request that he be permitted to take over Williams' interest in the partnership property, a remedy provided under California law when one partner has wrongfully caused the dissolution of the partnership, provided that the innocent partner pays the value of the wrongfully dissolving partner's interest. Cal. Corp. Code § 15038(b). App., *infra*, 56a. Rather than finding one party solely at fault, the arbitrators found unanimously that dissolution was required by the parties' mutual inability to get along and make decisions together. AA 02929. The arbitrators also unanimously denied Marsch's request for punitive damages. AA 02928.

The receiver ultimately sold the Horizon property to Williams in 1996 for more than its fair market value. App., *infra*, 48a-56a. The arbitration award had expressly

permitted Williams to use the $70,500,000 the Horizon partnership owed him to pay the $48,500,000 judgment against him. AA 02892. In addition, Williams was able to use the remainder of the $70,500,000 as a credit toward the purchase price of the partnership property. App., *infra*, 56a-59a. Williams paid $21,450,000 for the property, comprised of $2,500,000 in cash and $18,950,000 from his remaining credit. App., *infra*, 49a. The Court of Appeal confirmed the sale to Williams over Marsch's objection that Williams should not have been allowed to use his remaining credit. The court noted that Williams' bid exceeded the value of the property, App., *infra*, 55a, and explained that "there is nothing in the reasons given by the arbitrators which suggest they determined [Williams'] conduct was so egregious it undermined his ability to recover from the partnership the amounts he had advanced." App., *infra*, 57a.

C. *The La Jolla Partnerships Trial—Punitive Phase.* In the La Jolla partnerships trial, Williams was extremely concerned that Marsch would use the opportunity of introducing Horizon "motive evidence" for the improper purpose of recovering additional damages for Williams' conduct in Horizon. In addition to fighting a losing battle to limit the amount of Horizon evidence admitted, Williams requested and the trial court gave a limiting instruction to the jury with respect to the Horizon evidence. The court instructed the jury: "you may consider the evidence relating to Horizon Properties partnership *only* as it gives evidence of the party's [sic] conduct and intent in connection with the [La Jolla] partnerships." RT 2976 (emphasis added).

However, this limiting instruction was largely ignored at the punitive damages phase of the trial. While the trial court repeated the instruction at the punitive phase,

RT 4269-70, Marsch's counsel emphasized in his argument to the jury on punitive damages that Williams had become the sole owner of the Horizon property. RT 4281-82. Marsch's expert testified that the Horizon property had grown in value to $90,000,000 since Williams bought it. RT 4227. In urging the jury to make its punitive damages award large enough to "hurt" Williams, Marsch's counsel argued:

> [Y]ou heard some testimony about what went on in Horizon and how [Williams] ultimately took title to that entire property and left [March] with nothing. Somehow you have to assimilate the value of that property and factor in the length to which Mr. Williams was willing to go to advance his own interests, and you have to take something from him, and you have to make it hurt.

RT 4273. The jury returned a punitive damages award against Williams in the amount of $45,000,000, half the then-current value of the Horizon property, according to Marsch's expert. App., *infra*, 29a, 42a.

D. *Post-trial Proceedings In The Trial Court.* Williams moved for a new trial, arguing, among other things, that the punitive damages award was improperly based on his conduct in Horizon and was therefore the product of passion and prejudice as well as excessive in violation of state law and the Due Process Clause of the United States Constitution. AA 6753, 6758-59, 6766. The trial court denied Williams' motion for a new trial as well as his motion in the alternative for a remittitur of the punitive damages award to $1,000,000 or less. In denying Williams' motions, the trial court confirmed that the jury awarded $45,000,000 in order to punish Williams for his Horizon conduct:

> [T]he jury could have, at a minimum, determined the benefit obtained by Williams through his mis-

> deeds to be $90 million [the value ascribed to the Horizon property in Marsch's evidence]. It is likely more than coincidence the jury fixed punitive damages at one half that amount, a sum reasonably approximating his ill-gotten gains.

App., *infra*, 29a. The trial court then upheld the amount awarded on the same basis, holding that the amount was "reasonable and appropriate" because Williams should not be allowed to "profit" from Horizon. App., *infra*, 30a.

The trial judge's comments about "the benefit obtained by Williams" and Williams' "ill-gotten gains" ignored the facts that (1) Williams, like Marsch, lost everything he invested in the La Jolla partnerships; (2) Williams' liability for his conduct in Horizon had already been finally adjudicated; (3) Williams obtained the Horizon property through a process that was (a) ordered by the arbitrators with full knowledge of Williams' conduct in Horizon, and (b) upheld by the Court of Appeal as fair; and (4) Williams paid more for the Horizon property than its fair market value. Thus, while it was found that Williams had tried to obtain the Horizon property for less than its fair market value, in the end, he paid more than its fair market value. He also paid $48,500,000 in Horizon and $11,500,000 in La Jolla in compensatory damages for harm caused by his unsuccessful efforts to acquire the Horizon property for less than it was worth. The only "benefit" he achieved was market appreciation after his lawful purchase of the Horizon property for more than its fair market value.

E. *Proceedings In The California Court Of Appeal And California Supreme Court.* After the trial court confirmed the jury's verdict, Williams appealed to the California Court of Appeal, again arguing that the punitive damages award was based on improper considerations and

was excessive under both California law and the United States Constitution. Appellants' Opening Brief on appeal, 25-37 & n.37. Williams requested that the Court of Appeal either eliminate the punitive damages or remand for a new trial. *Id.* at 70.

The Court of Appeal agreed it was improper for the jury to punish Williams for his conduct in Horizon. At the outset of its opinion, the Court of Appeal set as its standard the " 'historically honored standard of reversing as excessive only those judgments which the entire record, when viewed most favorably to the judgment, indicates were rendered as the result of passion and prejudice.' " App., *infra*, 8a, quoting *Weeks v. Baker & McKenzie*, 63 Cal.App.4th 1128, 1166 (1998). In concluding that this standard was met in this case, the Court of Appeal repudiated the trial court's justification of the punitive award based on Horizon profits, holding that the Horizon arbitration had resolved all of the parties' claims relating to Horizon and that "any further recovery based on Horizon losses would be inconsistent with *res judicata* principles." App., *infra*, 12a.

The Court of Appeal also agreed that the punitive award was excessive. In reaching this conclusion, the court focused on the fact that the case involved "what is essentially abuse of commercial relationship between two individuals rather than conduct involving companies providing consumers with goods or services or conduct which directly causes physical or emotional injury." App., *infra*, 12a. While the court found that Williams' conduct justified a punitive award, the court noted that "the conduct did not cause personal injury, did not involve any intrusion on personal dignity implicated in an invasion of privacy, defamation or discrimination action, and was not the act of a large regulated quasi-public enterprise, such

as an insurance company or medical provider." App., *infra*, 9a-10a. Without such factors, there was not "any elevated or specific public interest in the parties' dispute" that would justify the large punitive award in this case. App., *infra*, 10a. In addition, there was "markedly less of any public interest to be derived from such a large transfer of wealth unrelated to actual harm incurred." App., *infra*, 12a.

Having found that the jury based its punitive damages award on improper considerations, having found that the resulting $45,000,000 award was excessive, and having held that there was an "absence of factors which show any elevated or specific public interest in the parties' disputes," App., *infra*, 10a, the Court of Appeal then declared that an award of 15 percent of Williams' net worth, or $28,155,000, would *not* be excessive. App., *infra*, 12a-13a. The only explanation the court gave for this figure was that it was reached "[a]fter considering what level of punitive damages would sufficiently punish Williams without either destroying him or providing Marsch with a windfall far in excess of the public interest in deterring similar conduct." App., *infra*, 12a. The Court of Appeal vacated the punitive damages award but ordered that Marsch could avoid a new trial if he consented to a reduction of the award to $28,155,000. App., *infra*, 26a.

Marsch accepted the reduction, and Williams timely petitioned the California Supreme Court for review, arguing, among other things, that once the Court of Appeal held that the jury based its punitive damages award on improper considerations, the Court of Appeal should have remanded for a new trial, at least on punitive damages, and that the damage award as modified was still excessive in violation of due process. Petition for Review, 4, 9-19. The California Supreme Court denied the petition for review. App., *infra*, 1a.

F. *Stage In The Proceedings When The Federal Questions Sought To Be Reviewed Were Raised.* As stated above, after the jury made its punitive damages award, petitioner brought a motion in the trial court for a new trial on U.S. constitutional grounds, among others. He argued that the jury's punitive damages award was improperly based on his conduct in Horizon and was therefore the product of passion and prejudice as well as excessive in violation of state law and the Due Process Clause of the U.S. Constitution, citing (among other authorities) this Court's decisions in *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994) and *BMW of North America v. Gore*, 517 U.S. 559 (1996). AA 6753, 6758-59, 6766.

After the trial court confirmed the jury's verdict, petitioner appealed to the California Court of Appeal, again arguing that the punitive damages award was based on improper considerations and was excessive under both California law and the United States Constitution, again citing (among other authorities) this Court's decision in *BMW of North America*, 517 U.S. 559, and again requesting a new trial. Appellants' Opening Brief on appeal, 25-37 & n.37.

Finally, in his petition to the California Supreme Court for review, petitioner argued that (1) it was improper for the Court of Appeal, after recognizing that the original award was based on improper grounds and excessive, to accept the jury's verdict as a benchmark and merely to modify the amount rather than remanding for a new trial free from impermissible considerations, citing (among other authorities) *Minneapolis, St. Paul & Sault Ste. Marie Ry. Co. v. Moquin*, 283 U.S. 520 (1931) and *Wells v. Dallas Independent School Dist.*, 793 F.2d 679, 684 (5th Cir. 1986), and (2) the punitive damages award as modi-

fied was still excessive in violation of due process, citing (among other authorities) *BMW of North America*, 517 U.S. 559. Petition for Review, 4, 9-19.

REASONS FOR GRANTING THE PETITION

In *Honda Motor*, this Court noted its strong emphasis in recent cases on "the importance of the procedural component of the Due Process Clause." 517 U.S. at 420. In *Honda Motor*, the Court struck down an Oregon statute precluding judicial review of the size of punitive damages awards, because the statute abrogated common law procedures for assuring "that those whose conduct is sanctionable by punitive damages are not subject to punitive damages of arbitrary amounts." *Id.* at 429. The Oregon statute precluding judicial review was unusual. By contrast, courts throughout the country are presented with the question of what remedy is appropriate when a jury awards damages based on improper considerations. Remittitur is vastly more efficient than a new trial, but it "present[s] difficult problems for appellate courts * * *, for court of appeals judges review the evidence from a cold paper record." *Gasperini v. Center for Humanities*, 518 U.S. 415, 421 (1998) (internal quotations omitted).

The only triers of fact to hear the evidence in this case based their $45,000,000 punitive damages award on improper considerations. The traditional common law remedy for a damage award infected by improper considerations is a new trial. The California Court of Appeal replaced this remedy with a remittitur based largely on the court's judgment of how big a hit petitioner's net worth could take without "destroying him." This Court should grant this petition to resolve the important question of whether there are due process limits on the practice of remittitur in state courts. The question of whether a punitive award of over $28,000,000 can be imposed

through remittitur on appeal without a trier of fact ever having assessed the case free from impermissible considerations addresses a fundamental safeguard against the arbitrary imposition of punitive damages awards.

Of equal significance is the approval of an award by remittitur that is at odds with the substantive limit on the amount of punitive damages awards that this Court has announced in its recent cases. In *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991), *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993), and *BMW of North America*, 517 U.S. 559, the Court granted certiorari because the different facts presented in each of those cases helped the Court to "illuminate 'the character of the standard that will identify unconstitutionally excessive awards.'" *Id.* at 568, quoting *Honda Motor*, 512 U.S. at 420. In this case, the California Court of Appeal imposed a punitive award of $28,155,000 on top of a $11,500,000 compensatory award against a 90 year old man with no prior record of misconduct. The recipient of both awards is a sophisticated real estate developer whom the jury found was also guilty of breach of fiduciary duty, breach of contract, and conversion. This case therefore presents the Court with the opportunity further to illuminate the standards for identifying grossly excessive punitive awards, in particular by addressing what roles a large compensatory award and the nature of the plaintiff should play in the analysis.

I. THE REDUCTION OF THE PUNITIVE AWARD FROM $45,000,000 TO $28,155,000 IN PLACE OF A NEW TRIAL WAS AN UNCONSTITUTIONAL ABROGATION OF TRADITIONAL DUE PROCESS

In determining what process is due under the Due Process Clause, "this Court has stated from its first due process cases [that] traditional practice provides a touch-

stone for constitutional analysis." *Honda Motor,* 512 U.S. at 430. A state's departure from a traditional practice designed to protect "against arbitrary and inaccurate adjudication," *id* at 430, "raises a presumption that its procedures violate the Due Process Clause." *Id.* In this case, the California Court of Appeal departed from the traditional practice of granting a new trial when a damage award is infected as a whole by improper considerations. While the presumption of unconstitutionality may be overcome if a state provides an adequate substitute for traditional practice, *id.* at 431, here the substitute that the Court of Appeal provided—a reduction of the punitive award to fifteen percent of petitioner's net worth—was inadequate and arbitrary.

A. Traditional Practice Required A New Trial When A Damage Award Was Infected As A Whole By Improper Considerations

Because the Fourteenth Amendment was ratified in 1868, nineteenth century practice provides the relevant tradition for due process analysis. *Honda Motor,* 512 U.S. at 434, n.12. There is no question that the practice of remittitur, that is the "withdrawal of a new trial if the plaintiff agreed to a specific reduction of damages," *id.* at 424, n.3, existed in the nineteenth century. However, its use was limited, and it was not allowed in cases in which jury error could not reliably be made harmless.

Where an award was based on an improper factor *and* it was possible to determine the amount of damages attributable to the error, nineteenth century practice permitted reductions in that amount. *See, e.g., Washington & Georgetown Railroad Co. v. Harmon's Administrator,* 147 U.S. 571, 590 (1893) (remittitur used to reduce award by amount of interest improperly awarded). As the Court explained in *Hansen v. Boyd,* 161 U.S. 397 (1896):

> The rule has been adopted by this court that it is proper, either for the trial court upon an application for a new trial, or for an appellate court in reviewing a judgment, to permit the party, in whose favor a verdict or judgment has been returned or entered, to avoid the granting of a new trial on account of error affecting only a part thereof, by entering a remittitur as to such erroneous part, *when the court can clearly distinguish and separate the same.*

Id. at 411 (emphasis added). Remittitur was also allowed where there was *no* error, but the amount of damages awarded was nevertheless excessive. *See. Arkansas Valley Land Co. v. Mann,* 130 U.S. 69, 72-75 (1889); *Northern Pacific Railroad Co. v. Herbert,* 116 U.S. 642, 646-47 (1886).

However, where improper considerations infected the entire damage award such that the resulting excess could not reliably be separated out from the rest of the award, the practice was to order a new trial. *See, e.g., Lee v. Southern Pacific Railroad Co.,* 101 Cal. 118, 120-21 (1894) ("where it appears that the excess has been given under the influence of passion or prejudice * * * it is * * * the duty of the court to grant a new trial"); *Lambert v. Craig,* 29 Mass. 199, 202 (1831) (new trial required where amount of damages attributable to error could not be ascertained).[3] As this Court recognized in *Arkansas Valley Land Co.,* "remitting the amount of the excess * * * cannot be allowed" in cases in which the jury's award is the product of prejudice or disregard of its instructions, "because the effect is to cast suspicion upon

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[3] For a collection of nineteenth century state cases and turn of the century treatises recognizing this rule, see Part II-A of the amicus brief filed by the Chamber of Commerce of the United States of America in *BMW of North America,* at notes 6 and 7 and accompanying text. 1994 U.S. Briefs LEXIS 896.

the conduct of the jury and their entire finding." 130 U.S. at 75, quoting *Stafford v. Pawtucket Haircloth Co.*, 22 F.Cas. 1030, 1030-31 (C.C. D.R.I. 1862) (No. 13275). *See also, Minneapolis, St. Paul & Sault Ste. Marie Ry. Co. v. Moquin*, 283 U.S. 520 (remittitur improper, new trial must be granted under the Federal Employers' Liability Act "where the verdict was obtained by appeals to passion and prejudice"); *Wells v. Dallas Independent School Dist.*, 793 F.2d at 684 (where award reflects passion, prejudice or other improper factors, "remittitur is inadequate and the only proper remedy is a new trial"); Wright, Miller & Kane, Federal Practice and Procedure: Civil § 2815, at 165 (2d ed. 1995) (remittitur "is not proper if the verdict was the result of passion and prejudice * * * * [i]n those instances a complete new trial is required").

In this case, the California Court of Appeal found it was improper for the jury to punish petitioner for his conduct in the Horizon partnership and that the resulting $45,000,000 punitive damages award met the state's standard requiring reversal only in the event of passion and prejudice. Therefore, traditional practice would have required that the court grant petitioner's request for a new trial. Instead, the court permitted respondent to avoid a new trial by reducing the punitive damages award to $28,155,000, based on its conclusion "that an award of 15 percent of Williams's net worth would not be excessive," because it would not "destroy[] him." App., *infra*, 12a-13a. This departure from traditional practice raises a presumption of unconstitutionality. *Honda Motor*, 512 U.S. at 430.

B. The Remittitur Here Was Not An Adequate Substitute For A New Trial

In *Honda Motor*, this Court noted that "not all deviations from established procedures result in constitu-

tional infirmity." 512 U.S. at 430. Where the deviation provides an adequate substitute for a traditional procedure or is warranted by "new problems not envisioned by rules developed in another era," such as the growth of the corporation as a new business entity, the procedural change will not be found unconstitutional. *Id.* at 431. In this case, the substitute the California Court of Appeal provided for granting a new trial was neither adequate nor warranted by social changes unforseen in the nineteenth century.

The method the California Court of Appeal used to decide on the amount of the remittitur was not designed to determine what the jury would have awarded had it not been influenced by improper considerations. It appears that the jury wanted to take from petitioner one-half of the profits he realized as a result of his misconduct. However, the only profits petitioner stood to realize were from his ownership of the *Horizon* property. The Horizon property was not obtained by misconduct, nor, as found by the Court of Appeal on *res judicata* grounds, was petitioner's ownership of it a proper basis for a punitive damages award. Had the jury based its punitive award only on the profits petitioner was expected to realize as a result of his misconduct in the *La Jolla* partnerships, it should have awarded nothing, as petitioner, like respondent, lost all that he invested in the La Jolla partnerships. Even if it is assumed that a jury uninfluenced by improper considerations could properly have returned a punitive award of more than zero, there is no basis for assuming that such a jury would make an award in an amount anywhere close to $28,155,000.

In *Haslip*, this Court, in expressing general approval for "the detailed substantive standard" that the Alabama Supreme Court had developed for evaluating punitive

awards, 499 U.S. at 20-21, emphasized that "the fact-finder must be guided by more than the defendant's net worth. Alabama plaintiffs do not enjoy a windfall because they have the good fortune to have a defendant with a deep pocket." *Id.* at 22. In this case, an arbitrary exaction of fifteen percent of petitioner's net worth was not a fair substitute for a new trial in which the jury is not only free from improper considerations but also guided by more than petitioner's net worth.

The Court of Appeal's exaction of fifteen percent of petitioner's net worth is particularly arbitrary here because the court found there was no basis for a heightened award, yet punitive awards greater than ten percent of a defendant's net worth are generally vacated in California as excessive and presumptively the result of jury passion or prejudice. *See, Weeks v. Baker & McKenzie,* 63 Cal.App. 4th at 1166 ("It has been recognized that punitive damages awards generally are not permitted to exceed 10 percent of the defendant's net worth."); *Michelson v. Hamada,* 29 Cal.App.4th 1566, 1596 (1994) (same); *Seeley v. Seymour,* 190 Cal.App.3d 844, 869 (1987) ("awards totalling more than 10 percent of a defendant's net worth have been disfavored by our courts"); *Little v. Stuyvesant Life Ins. Co.,* 67 Cal.App.3d 451, 469-70 (1977) (punitive award that is 15 percent of net worth is "grossly disproportionate to the wealth of defendant"). "[S]ignificantly lower percentages are indeed the norm." *Storage Services v. Oosterbaan,* 214 Cal.App.3d 498, 515 (1989).

In cases involving defendants with high net worth, the percentage of their net worth exacted by punitive awards has been dramatically lower in California, less than one percent. *See, e.g., West v. Johnson & Johnson Products, Inc.,* 174 Cal.App.3d 831, 871, 877 (1985) (affirming

$1,000,000 award, .045 percent of $2,249,000,000 net worth); *Grimshaw v. Ford Motor Co.*, 119 Cal.App.3d 757, 818, 820 (1981) (affirming $3,500,000 award, .045 percent of $7,700,000,000 net worth); *Neal v. Farmers Ins. Exchange*, 21 Cal.3d 910, 920, 927 n.11, 929 (1978) (affirming $740,000 award, .35 percent of $211,000,000 net worth).[4]

Not only was the Court of Appeal's procedure in this case no substitute for the traditional remedy of a new trial, but also there has been no social change unforeseen in the nineteenth century that justifies the Court of Appeal's arbitrary exaction of fifteen percent of petitioner's net worth in place of a new trial. To the contrary, this Court's observation in *Honda Motor* that "[p]unitive damages pose an acute danger of arbitrary deprivation of property," 512 U.S. at 432, is true now more than ever. "In the past, such awards 'merited scant attention' because they were 'rarely assessed and likely to be small in amount.' " *Haslip*, 499 U.S. at 61 (O'Connor, J., dissenting), citing Ellis, Fairness and Efficiency in the Law of Punitive Damages, 56 S.Cal.L.Rev. 1, 2 (1982). "Recent years, however, have witnessed an explosion in the frequency and size of punitive damages awards." *Haslip*, 499 U.S. at 61 (O'Connor, J., dissenting), citing RAND Institute for Civil Justice, M. Peterson, S. Sarma & M. Shanley, Punitive

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[4] The $10,000,000 punitive damages award upheld by this Court in *TXO Production Corp.* was approximately one-half of one percent of the defendant's net worth. *See TXO Production Corp.*, 509 U.S. at 494 (O'Connor, J., dissenting) (citing to transcript reference to TXO as a "two billion dollar company"). Presumably the punitive award of $840,000 that this Court upheld in *Haslip* against a large insurance company, 499 U.S. at 7 n.2, as well as the $2,000,000 punitive award against a large automobile manufacturer that this Court found unconstitutionally high in *BMW of North America*, 517 U.S. 559, were even smaller percentages of those defendants' net worth.

Damages—Empirical Findings iii (1987). Justice O'Connor has urged strongly that such trends require that states provide defendants with *additional* protections against large punitive awards beyond those provided by the common law system. *Haslip*, 499 U.S. at 62-64 (O'Connor, J., dissenting). Certainly, no abandonment of a traditional safeguard against the imposition of punitive damages in arbitrary amounts can be justified in light of these trends.

II. THE PUNITIVE AWARD OF $28,155,000 WAS GROSSLY EXCESSIVE

In *BMW of North America*, this Court established three guideposts for determining whether the amount of a punitive damages award comports with the Constitution. These are: (1) the degree of reprehensibility of the defendant's conduct; (2) the disparity between the harm or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages award and the civil penalties authorized or imposed in comparable cases. 517 U.S. at 574-75. Analysis of the $28,155,000 punitive damages award in this case according to these guideposts demonstrates that it is grossly excessive in violation of the substantive component of the Due Process Clause.

A. Degree of Reprehensibility

Petitioner's misconduct in this case consisted of delaying the sale and refinancing of two buildings to respondent's (and petitioner's) detriment for an improper purpose that petitioner concealed from respondent. Statement of the Case, *supra*. While the Court of Appeal found that petitioner's conduct warranted the imposition of punitive damages, App., *infra*, 9a, the fact that "conduct is sufficiently reprehensible to give rise to tort liability, and even a modest award of exemplary damages, does not establish

the high degree of culpability that warrants a substantial punitive damages award." *BMW of North America*, 517 U.S. at 580. In this case, several factors compel the conclusion that petitioner's conduct did not warrant a punitive exaction in the staggering sum of $28,155,000.

First, as the California Court of Appeal found, there was an "absence of factors which show any elevated or specific public interest in the parties' dispute" that would justify a heightened level of punitive damages. App., *infra*, 10a. Consideration of the reprehensibility of any particular conduct for purposes of "the federal excessiveness inquiry appropriately begins with an identification of the state interests that a punitive award is designed to serve." *BMW of North America*, 517 U.S. at 568. In concluding that the state's interest in this case was weak, the Court of Appeal emphasized that petitioner's "conduct did not cause personal injury, did not involve any intrusion on personal dignity implicated in an invasion of privacy, defamation or discrimination action, and was not the act of a large regulated quasi-public enterprise, such as an insurance company or medical provider." App., *infra*, 9a-10a. Rather, it was purely economic in nature and "did not harm anyone other than plaintiff." App., *infra* 3a. *Compare, Grimshaw v. Ford Motor Co.*, 119 Cal.App.3d at 820 (intentional tortious conduct that endangered the lives of thousands of consumers not sufficiently reprehensible to suport $125,000,000 punitive damages award; remitted to $3,500,000).

Second, there was no evidence that petitioner had a history of misconduct towards anyone other than respondent. By contrast, there was evidence in *TXO Production Corp.* that the defendant there "had engaged in similar nefarious activities in its business dealings in other parts of the country." 509 U.S. at 450-51. *See also, BMW of North America*, 517 U.S. at 577 ("Our holdings that

a recidivist may be punished more severely than a first offender recognize that repeated misconduct is more reprehensible than an individual instance of malfeasance.")

Third, as the California Court of Appeal noted, petitioner is not "a large quasi-public enterprise, such as an insurance company." App., *infra, 10a. Compare, Haslip,* 499 U.S. at 23-24 (holding approximately $840,000 punitive award against $2 billion insurance company that had defrauded consumers "close to the line" constitutionally). The state's interest in deterring misconduct by a 90 year old individual who had no history of misconduct prior to his relationship with respondent cannot be very strong, where the effect of any punitive damages award will fall far more heavily on petitioner's innocent heirs than on petitioner himself.

Finally, petitioner's conduct did not harm an innocent or helpless party. Respondent is a sophisticated and successful real estate developer who breached his fiduciary and contractual duties to petitioner and converted partnership funds. App., *infra,* 38a-39a (respondent's breaches), 3a (plaintiff was a "successful developer"); RT 4302 (trial judge remark that "Mr. Marsch is no virgin in the game. He's been around. He's a tough guy, knows what is going on, and finally met a tougher guy").

In *Seeley v. Seymour,* 190 Cal.App.3d 844, by contrast, the California Court of Appeal reversed a $2,550,000 punitive award in part because the parties were sophisticated real estate developers of relatively equal bargaining strength. Defendant's wrongdoing thus carried "a lesser degree of 'reprehensibility' than the more typical punitive damages case where a large or sophisticated business enterprise uses its wealth or power to exploit the weak or unwary." *Id.* at 867-68 (citations omitted). *See also, Las Palmas Associates v. Las Palmas Center As-*

sociates, 235 Cal.App.3d 1220, 1255 (1991) (reducing $10,000,000 punitive award to $2,000,000 in part because wrongdoer's conduct was less reprehensible in light of adverse parties' status as "sophisticated real estate developers" and not "widow and her small children" deprived of their "family homestead" by "heartless conglomerate"); *and compare, BMW of North America,* 517 U.S. at 589 (Breyer, J., concurring) ("tricking the elderly out of their life savings" an example of "the most serious kinds of misrepresentations").

Under these circumstances, petitioner's conduct was not sufficiently reprehensible to support the imposition of a $28,155,000 punitive damages award.

B. Disparity Between the Compensatory and Punitive Damages

This Court's second guidepost calls for an analysis of the disparity between the compensatory and punitive damages awards. *BMW of North America,* 517 U.S. at 575. While the "most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on the plaintiff," *id.* at 580, this Court has consistently rejected the notion that there is "a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case." *Id.* at 583, *citing TXO Production Corp.,* 509 U.S. at 458, and quoting *Haslip,* 499 U.S. at 18.

In reiterating its rejection of a "categorical approach," this Court in *BMW of North America* noted that low awards of compensatory damages may properly support a higher ratio of punitive to compensatory damages than higher compensatory awards can support. 517 U.S. at 582. In cases in which actual damages are extremely small, a high ratio of punitive to actual damages may be

necessary to accomplish an appropriate level of deterrence. *See, e.g., St. Louis Iron Mountain & S. Ry. v. Williams,* 251 U.S. 63 (1919) (upholding statutory civil penalty of $75 in case in which plaintiff's actual damages were $0.66). On the other hand, when, as in this case, compensatory damages are high, even a one-to-one ratio of punitive to compensatory damages can produce excessive punishment and deterrence. *See, e.g., Crookston v. Fire Ins. Exch.,* 817 P.2d 789, 810 (Utah) (1991) (suggesting that the acceptable ratio of punitive to compensatory damages decreases as compensatory damages increase); *Chandler v. Denton,* 741 P.2d 855, 868 (Okla.) (1987) (where $600,000 compensatory award was "ample and generous," $500,000 punitive exaction was "not * * * responsive to the purpose of civil punishment" and should be reduced to $250,000).

Here, while the ratio of punitive damages to compensatory damages is approximately two and one-half to one, the punitive damages award exceeds the compensatory damages by a whopping $16,655,000. *Compare, TXO Production Corp.,* 509 U.S. 453 (punitive award that was 526 times compensatory damages exceeded compensatory damages by only $9,981,000); *BMW of North America,* 517 U.S. 559 (punitive award that was 500 times compensatory damages exceeded compensatory damages by only $1,960,000); *Haslip,* 499 U.S. at 7 and n.2 (punitive award that was approximately four times compensatory damages exceeded compensatory damages by approximately $640,000). By contrast, the largest difference between punitive and compensatory damages in a published California decision is $4,847,000. *Downey Savings & Loan Assn. v. Ohio Casualty Ins. Co.,* 189 Cal.App.3d 1072, 1080 (1987).

Any comparison of punitive and compensatory damages must take into account that the compensatory dam-

ages awarded in this case are a massive $11,500,000. This large compensatory damage award is sufficient to satisfy the state interest in deterrence by itself. The underlying premise of much of American tort law is that the prospect of paying compensatory damages will itself ordinarily provide the proper level of incentives for taking reasonable precautions against injuring others. *See, e.g.*, W. Keeton, et al., Prosser And Keeton On The Law Of Torts § 5, at 23 (4th ed. 1971) ("[w]hen the decisions of the courts become known, and defendants realize that they may be held liable, there is of course a strong incentive to prevent the occurrence of the harm"); 1 D. Dobbs, Law Of Remedies § 3.1, at 282 (2d ed. 1993) ("[e]ven if the defendant is not subject to punitive damages, an ordinary 'compensatory' damages judgment can provide an appropriate incentive to meet the appropriate standard of behavior"); *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 307 (1986) ("[d]eterrence operates through the mechanism of damages that are compensatory"); *Smith v. Wade*, 461 U.S. 30, 94 (1983) (O'Connor, J., dissenting) ("awards of compensatory damages and attorney's fees already provide significant deterrence").

C. Sanctions For Comparable Misconduct

The $28,155,000 punitive award is also grossly excessive under this Court's third guidepost, comparing the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct. Here, the trial court noted that "if Mr. Williams were convicted of grand theft for what he did, the maximum fine would be $10,000." RT 4302. In *BMW of North America*, this Court struck down a $2,000,000 punitive damages award based on fraud and deceptive practices in part because the maximum civil penalty for comparable conduct was $10,000. 517 U.S. at 584.

The point of comparing punitive awards with a state's civil and criminal penalties for comparable conduct is that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." 517 U.S. at 574. Here, no precedent in California put petitioner on notice of the grossly excessive punishment exacted in this case, which is five times the amount of the largest punitive damages award in any reported California case. See, *Downey Savings & Loan Assn. v. Ohio Casualty Ins. Co.*, 189 Cal.App.3d at 1080 (punitive award of $5,000,000). Indeed, the award in this case dwarfs—both in amount and, as noted in Part II-B above, as a percentage of net worth—the punitive awards in reported California decisions in which the conduct at issue was much more egregious.

For example, this case does not involve a high-level decision to maximize profits in conscious disregard of the physical safety of others. Compare, *Grimshaw v. Ford Motor Co.*, 119 Cal.App.3d at 819-20 ($3,500,000 punitive award affirmed; defendant "exhibited a conscious and callous disregard of public safety," plaintiff horribly burned when rear-end collision punctured Pinto's gas tank); *West v. Johnson & Johnson Products, Inc.*, 174 Cal.App.3d at 840, 869, 877 ($1,000,000 award affirmed; defendant failed adequately to test tampon even when faced with continuing customer complaints; plaintiff suffered toxic shock syndrome); *see also, Nelson v. Gaunt*, 125 Cal. App.3d 623, 631, 643-644 (1981) ($1,500,000 award affirmed; defendant doctor injected patient with liquid silicone knowing it was illegal and unsafe; patient underwent six surgeries as a result, including double mastectomy).

Nor does this case involve an insurance company acting in its capacity as a quasi-fiduciary to its insureds while

engaged in company-wide invidious practices. *Compare, e.g., Neal v. Farmers Ins. Exchange,* 21 Cal.3d at 923, 929 ($740,000 punitive award affirmed; insured's exigent financial circumstances used as a lever to force more favorable settlement of claim, "a conscious course of conduct firmly grounded in company policy"); *Downey Savings & Loan Assn.,* 189 Cal.App.3d at 1098-1100 ($5,000,000 award affirmed; insurer instructed its adjusters to find ways to defeat claims); *Moore v. American United Life Ins. Co.,* 150 Cal.App.3d 610, 640, 642 (1984) ($2,500,000 award affirmed; insurer "consciously pursued practice or policy of cheating insureds out of benefits by obtaining incorrect opinions of total disability from treating physicians").

Nor does this case involve consumer fraud. *Compare, e.g., Rosener v. Sears Roebuck & Co.,* 110 Cal.App.3d 740, 748-749, 753, 757 (1980) (remitting $10,000,000 punitive award to $2,500,000 in a case involving "the protection of vulnerable and unwary consumers"); *Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.,* 155 Cal.App.3d 381, 389, 391 (1984) ("relatively large" $80,000 punitive award affirmed where a car dealer's conduct was extremely reprehensible; "the pressure applied and the misrepresentations made to defraud this elderly couple were unconscionable"); *Zhadan v. Downtown LA Motors,* 66 Cal.App.3d 481, 498-500 (1976) ($175,000 punitive damages award excessive even though "important policy of the Automotive Repair Act at stake"; new trial ordered on damages).

What this case does involve is a private dispute between two sophisticated real estate developers, each of whom had the ability to, and in fact did, protect his own interests. The $28,155,000 punitive damages award under these circumstances could not have been anticipated, is grossly

excessive in violation of the constitution, and should have been reversed.

CONCLUSION

A writ of certiorari should issue to review the order of the California Court of Appeal, Fourth Appellate District, that allows respondent to avoid a new trial by accepting a reduction of the punitive damages award to $28,155,000.

Respectfully submitted,

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May 1999

APPENDICES

APPENDIX A

[Filed Apr. 14, 1999]

Fourth Appellate District, Division One, No. D029175
S076928

IN THE SUPREME COURT OF CALIFORNIA

NICHOLAS MARSCH, III,
Respondent

v.

RONALD WILLIAMS *et al.*,
Appellants

Petition for review DENIED.

/s/ George
Chief Justice

APPENDIX B

[Filed Jan. 20, 1999]

COURT OF APPEAL
FOURTH APPELLATE DISTRICT
DIVISION ONE
STATE OF CALIFORNIA

D029175
(Super. Ct. No. 654159)

NICHOLAS MARSCH III,
Plaintiff and Respondent,

v.

RONALD WILLIAMS *et al.*,
Defendants and Appellants.

APPEAL from a judgment of the Superior Court of San Diego County, Robert J. O'Neill, Judge. Affirmed with directions.

The jury in this real property partnership dispute found that defendant and appellant Ronald Williams [1] was guilty of fraud, breach of fiduciary duty and breach of contract. The jury awarded Williams's former partner, plaintiff and respondent Nicolas Marsch III, $11.5 million in compensatory damages and $45 million in punitive damages.

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[1] In addition to Williams, Palo Alto Town & Country Village, Inc. (T&C), and the Ronald Williams Living Trust (the Williams Trust) are also defendants and appellants. Unless otherwise indicated they are collectively referred to as Williams.

On appeal we find no error in the trial court's liability determination or its award of compensatory damages. However, we find that under the circumstances presented here, an award of punitive damages which represented almost one-fourth of Williams's $187.7 million of net worth is excessive. In particular, we note that defendant's conduct did not cause any physical injury or invasion privacy, did not amount to a violation of plaintiff's civil rights and did not harm anyone other than plaintiff. We also note that the punitive damage award amounts to almost four times the amount of compensatory damages. Given these circumstances, we believe that the level of detriment imposed on Williams and the size of the windfall bestowed on plaintiff far surpass any public interest in deterring Williams's conduct. Accordingly, we affirm the judgment but only on condition that the plaintiff accept a reduced punitive damage award of $28.155 million or 15 percent of Williams's net worth.

I

FACTUAL BACKGROUND

This is the fourth time these parties have brought their related disputes to this court.[2] For the purpose of considering this appeal, we take up the legal saga at the end of 1984 at which time Marsch was a successful developer of two commercial buildings located in La Jolla. Marsch and his wife each owned a 50 percent interest in the buildings.

In January 1985 Marsch purchased several hundred acres of land in Rancho Santa Fe. Marsch planned to

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[2] The other cases we have considered are: *Marsch* v. *Williams* (1994) 23 Cal.App.4th 238 (*Marsch I*); *Marsch* v. *Williams* (1994) 23 Cal.App.4th 250 (*Marsch II*); and Marsch v. Williams D026747, D026916.

develop a golf course on the property along with 240 luxury home sites. Marsch incorporated his golf course project as New Horizon Group, Inc. (New Horizon).

Because Marsch did not have access to the capital needed to finance his golf course project, he decided to find a partner with substantial financial resources. Later in 1985 he was introduced to Williams, a man of independent means with many years' experience in real estate and golf course development. Williams is the sole trustee of the Williams Trust and president of T&C, a California corporation. The Williams Trust is the sole shareholder of T&C.

According to Marsch, Williams represented that he could provide all further financing for the golf course development. Initially, Williams paid Marsch $25,000 for 50 percent of the shares of New Horizon. In December 1986 the enterprise was reorganized as a partnership doing business as Horizon Properties (Horizon).

Because the Marsches wanted to liquidate a portion of their equity in the La Jolla buildings, in May 1986 Patricia Marsch sold her one-half interest in the buildings to T&C for $5 million. In conjunction with the sale of his wife's interest in the buildings to T&C, Marsch gave T&C a number of financial guarantees and an option to demand that Marsch repurchase the partnership interest for an amount equal to T&C's initial investment plus interest.

As we explained in *Marsch II*, "[t]he relationship between Marsch and Williams was not successful. According to Marsch, Williams wanted to obtain Marsch's interest in the Horizon project for far less than its fair value and toward that end exerted financial pressure on Marsch by failing to make timely capital contributions to the

Horizon project and refusing to cooperate in either selling or refinancing the buildings owned by the La Jolla partnerships.

"Marsch and Williams did try to resolve their differences without resort to litigation. However, work stopped on the Horizon project in February 1990. In August 1990, on a petition filed by T&C, the La Jolla partnerships were placed in involuntary bankruptcy and the buildings the partnership owned were sold as part of the bankruptcy liquidation." (*Marsch II, supra,* 23 Cal.App.4th at p. 253.)

II

PROCEDURAL HISTORY

In *Marsch II* we also set out pertinent portions of the lengthy and intertwined history of the separate claims Marsch has asserted against Williams growing out of the Horizon project and T&C's participation in the La Jolla partnerships: "In July 1990 Marsch filed a complaint against Williams in which he alleged Williams's conduct in the Horizon partnership gave rise to causes of action for fraud, breach of fiduciary duty and intentional infliction of emotion distress. Williams responded to the Horizon complaint by filing a petition to compel arbitration and the petition was granted. A three-person arbitration panel (Panel) found that Williams had caused $48 million in damage to the Horizon partnership but that he was owed $70 million in advances he had made to the partnership. [The Panel appointed one of its members to act as a receiver for the project and directed the receiver to liquidate the partnerships assets.] The Panel also found that any claims arising out of the La Jolla partnerships were outside the scope of the arbitration. [The Panel's award was confirmed by the trial court.]

"Marsch commenced the instant action against Williams by filing a complaint on July 17, 1992. The complaint sought damages for breach of contract and fiduciary duty, fraud, intentional and negligent infliction of emotional distress, and other tortious acts based upon Williams's conduct in the La Jolla Partnerships. The trial court denied Williams's motion to strike all references to Horizon in the complaint. Williams then filed a petition to compel arbitration and stay litigation. He argued that by relying upon Williams's conduct in Horizon to establish portions of his La Jolla case, Marsch's complaint had its 'roots in the relationship created by the Horizon Properties Partnership Agreement' and was controlled by the arbitration clause in the agreement.

"Marsch argued the arbitration clause did not control because (1) 'All causes of action and damages sought in the present action relate solely to conduct and duties owed the separate and distinct La Jolla Partnerships,' and (2) the arbitration Panel had already ruled such rights and duties to be beyond the scope of the Horizon arbitration clause."

"The trial court denied the petition to compel arbitration. The court found the La Jolla action did not arise out of and was not related to the Horizon partnership agreement and was not controlled by the arbitration clause in that agreement." (*Marsch II, supra,* 23 Cal. App.4th at pp. 253-254, fn. omitted.)

In *Marsch I* we affirmed in large part the trial court's order confirming the arbitration panel's resolution of the Horizon dispute. We reversed only that portion of the award which appointed a receiver; we found that only the superior court has the power to appoint a receiver. (*Marsch I, supra,* 23 Cal.App.4th at pp. 247-248.) Upon remand, the trial court appointed a receiver who sold the

Horizon property at auction to Williams for a price of $21.45 million. The sale to Williams, however, did not bring the Horizon partnership any new consideration because Williams was allowed to credit bid the net amount of his recovery under the aribtration award, plus interest. By the time of the auction, the amount Williams was permitted to credit bid totalled $56 million. In an unpublished opinion, D026747, D026919, we affirmed the propriety of the credit bid and the sale.

In *Marsch II* we affirmed the trial court's order denying Williams's petition to arbitrate the La Jolla partnership disputes. We noted that while the Horizon partnership agreement contained an arbitration provision, the La Jolla partnership agreements contained no such provision. In rejecting Williams's argument that Marsch's likely use of evidence of what occurred in the Horizon partnership to prove his La Jolla claims made those claims arbitrable, we stated: "In his La Jolla action Marsch seeks to vindicate the rights created by the La Jolla agreements. There is no agreement, either expressed in the documents executed by the parties or implied from the nature of the parties' relationships, that the Horizon dispute resolution mechanisms must be used to vindicate those rights. Moreover, the evidence Marsch may choose to employ in proving his claims will not, by itself, demonstrate the existence of such an agreement." (*Marsch II*, 23 Cal.App.4th at p. 257.)

On remand the La Jolla claims were tried by a jury. As we indicated at the outset, the jury found that Williams was guilty of fraud, breach of fiduciary duty and breach of contract and that his conduct caused $11.5 million in damage to Marsch. The jury also found that Williams acted with malice, oppression or fraud and awarded Marsch $45 million in punitive damages. In ad-

dition to imposing liability on Williams, the jury also found in his favor on his cross-complaint against Marsch and awarded him $555,100 on his breach of contract and conversion claims.

Williams filed a timely notice of appeal.

III

DISCUSSION

A. *Punitive Damages*

In his principal argument on appeal, Williams contends that the amount of punitive damages awarded was excessive. We agree.

"Under settled principles, '. . . our review of punitive damage awards rendered at the trial level is guided by the "historically honored standard of reversing as excessive only those judgments which the entire record, when viewed most favorably to the judgment, indicates were rendered as the result of passion and prejudice. . . ." [Citation.]' [Citation.] As we noted earlier, the purpose and function of punitive damages is to punish wrongdoing and thereby protect the public from future misconduct, either by the same defendant or by other potential wrongdoers. [Citations.] In determining whether an award is excessive the courts apply three criteria grounded in that purpose and function: (1) the particular nature of the defendant's acts in light of the whole record, (2) the amount of compensatory damages awarded, and (3) the wealth of the defendant. [Citation.] The key question is whether the amount of damages awarded exceeds the level necessary to properly punish and deter. [Citation.] Thus, '. . . the function of deterrence . . . will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort. [Citations.] By the

same token, of course, the function of punitive damages is not served by an award which, in light of the defendant's wealth and the gravity of the particular act, exceeds the level necessary to properly punish and deter.' [Citation.]" (*Weeks v. Baker & McKenzie* (1998) 63 Cal. App.4th 1128, 1166.)

"Moreover, we must be guided by the well-established principle that punitive damages are not favored in law. [Citations.] Such damages constitute a windfall, which, though suported by law in proper cases [citation], creates the anomaly of excessive compensation which makes the remedy an unappealing one. [Citation.]" (*Rosener v. Sears, Roebuck & Co.* (1980) 110 Cal.App.3d 740, 750.)

Here, the record amply supports the jury's implied finding that Williams was dishonest, deceitful and unfair in his dealings with Marsch and that his conduct caused Marsch and his wife to lose most of the wealth they had acquired prior to their relationship with him. As the trial court noted in denying Williams's motion for a new trial, Williams made "callous use of his superior economic power" and "abuse of [Marsch's] trust and confidence" in "blatant violation of [Williams's] fiduciary responsibility in the La Jolla partnership." The trial court found Williams "lied to his partner about reasons he would not cooperate with him in the conduct of the partnership business" that "Williams was a fraud" who "use[d] [his] economic power to abuse and overwhelm [his] partner."

Given the nature of Williams's conduct, we have no difficulty accepting the notion that it warrants punishment beyond what is available by way of compensatory damages. (See *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 922-923 [oppressive conduct in failing to settle insurance claims].) However, by the same token we cannot ignore the fact the conduct did not cause per-

sonal injury, did not involve any intrusion on personal dignity implicated in an invasion of privacy, defamation or discrimination action, and was not the act of a large regulated quasi-public enterprise, such as an insurance company or medical provider. While the absence of these circumstances does not prevent an award of punitive damages, the absence of factors which show any elevated or specific public interest in the parties' dispute makes it somewhat more difficult to justify any heightened level of punitive damages.

The fact that punitive damages were approximately four times the level of compensatory damages does not support any finding of excessiveness. In both *Neal v. Farmers Ins. Exchange* and more recently in *Weeks v. Baker & McKenzie*, the court approved punitive damages which were 70 times the amount of compensatory damages. (See *Neal v. Farmers Ins. Exchange, supra*, 21 Cal.3d at p. 92.)

This leaves us with the fact that the punitive damages award represents almost one-quarter of Williams's net worth. As the court in *Adams v. Murakami* (1991) 54 Cal.3d 105, 111-112, noted, in reviewing a punitive damage award, "the most important question is whether the amount of the punitive damages award will have deterrent effect—without being excessive. Even if an award is entirely reasonable in light of the other two factors in *Neal, supra*, 21 Cal.3d 910 (nature of the misconduct and amount of compensatory damages), the award can be so disproportionate to the defendant's ability to pay that the award is excessive *for that reason alone.* For example, in *Burnett v. National Enquirer, Inc.* (1983) 144 Cal.App.3d 991, the court reiterated the *Neal* factors . . . and concluded that, although the defendant's misconduct was 'reprehensible,' the punitive damages

award had to be reduced solely because it constituted too great a portion of the defendant's net worth and income. [Citation.] The court explained that it could 'find acceptable only that balance between the gravity of a defendant's illegal act and a penalty necessary to properly punish and deter. . . .' [Citation.]"

Although some courts have adopted the proposition "that punitive damages awards generally are not permitted to exceed 10 percent of the defendant's net worth" (*Weeks v. Baker & McKenzie, supra,* 63 Cal.App.4th at p. 1166; see also *Storage Services v. Oosterbaan* (1989) 214 Cal. App.3d 498, 515), we have repeatedly held that there is no "specific numerical percentage to net worth as constituting the upper permissible limit for the amount of a punitive damages award." (*Vallbona v. Springer* (1996) 43 Cal.App.4th 1525, 1539, citing *Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.* (1984) 155 Cal.App.3d 381, 393-396.) As we stated in *Devlin v. Kearny Mesa AMC/Jeep/Renault*: "Instead of making a mathematical breakthrough we discovered what everyone probably already knows: the formula does not exist. And, we have concluded, that is properly so." (*Id.* at p. 388.) We concluded that "the reason why there is no simple formula for calculating punitive damages is that there is no particular sum which represents the *only* correct amount for such damages in any given case. Instead, there is a range of reasonableness for punitive damages reflective of the fact finder's human response to the evidence presented." (*Id.* at p. 391.)

In our view the $45 million punitive damages award far exceeds the range of what is needed to deter conduct such as Williams's. Aside from the relatively large portion of his net worth, we also note that in absolute terms the award represents an extremely large windfall for

Marsch. Where, as here, we are called upon to consider what is essentially abuse of a commercial relationship between two individuals rather than conduct involving companies providing consumers with goods or services or conduct which directly causes physical or emotional injury, there is in our view markedly less of any public benefit to be derived from such a large transfer of wealth unrelated to actual harm incurred.

The facts here are readily distinguishable from the circumstances we considered in *Vallbbona v. Springer* where three plaintiffs share a total of $225,000 in punitive damages assessed as a result of the defendants' misrepresentation as to the effectiveness of a laser treatment for cellulite. That award did not represent a monumental windfall for any of the plaintiffs and there was a self-evident public interest in punishing defendants who made a business of defrauding persons seeking medical treatment.

Marsch also argues, and the trial court found, the jury could have awarded the $45 million on the basis that that figure represents one-half of the profits Williams may realize from his acquisition of the Horizon assets. However, in light of the fact the Horizon arbitration resolved all claims between the parties, any further recovery based on Horizon losses would be inconsistent with res judicata principles. (See e.g. *Thibodeau v. Crum* (1992) 4 Cal.App. 4th 749, 754-756; *Lyons v. Security Pacific Nat. Bank* (1955) 40 Cal.App.4th 1001, 1015.)

After considering what level of punitive damages would sufficiently punish Williams without either destroying him or providing Marsch with a windfall far in excess of the public interest in deterring similar conduct, we have concluded that an award of 15 percent of Williams's net

worth [3] would not be excessive. Thus, if Marsch is willing to accept a reduction of the punitive damages award to $28.155 million, the judgment will be so modified and as modified affirmed. (See *Burnett v. National Enquirer, Inc.* (1983) 144 Cal.App.3d at 991, 1018-1019.)

B. *Liability*

1. Horizon Evidence

Williams contends that the trial court erred in permitting Marsch to present too much evidence of the wrongdoing he committed in the Horizon partnership. He argues that the Horizon issues were resolved in the Horizon arbitration and were unrelated to the La Jolla disputes. He also suggests that in his appeal in *Marsch II*, Marsch represented that Horizon evidence would only be tangential to claims asserted here and that Marsch was therefore estopped to present a large quantum of evidence from the Horizon dispute.

The trial court rejected Williams's attempt to limit evidence of his Horizon activities. During the course of the trial the trial court stated: "There is absolutely no question in my mind based upon this evidence that there is an unavoidable relationship between the conduct of these two gentlemen as it relates to Horizon and the issues that are before this court as it relates to La Jolla. They are absolutely related. There's no question in my mind that this case as to La Jolla cannot fairly be tried without reference to Horizon."

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[3] Like the trial court, we rely on the evidence Marsch presented to the jury which showed that Williams had a net worth of $187.7 million. We decline Marsch's invitation to go outside the record for evidence that Williams's net worth was higher. (See *Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1660-1661.)

Under Evidence Code section 352, the trial court had the power to determine whether the probative value of the Horizon evidence outweighed its prejudicial impact, subject only to our review for abuse of discretion. (See *Blank v. Kirwan* (1985) 39 Cal.3d 311, 331; *Smith v. Brown-Forman Distillers Corp.* (1987) 196 Cal.App.3d 503, 519; *Aguayo v. Crompton & Knowles Corp.* (1986) 183 Cal.App.3d 1032, 1038.) Because Marsch's theory of liability was that Williams was willing to allow the La Jolla buildings to be lost to foreclosure as a means of exerting financial pressure of Marsch, evidence which showed that Williams took similar steps in the Horizon partnership itself was plainly relevant in establishing Williams's motive and plan. (See *Sprague v. Equifax, Inc.* (1985) 166 Cal.App.3d 1012, 1034; *Wellnitz v. Sacramento Suburban F. L. Co.* (1929) 97 Cal.App. 51, 54.) Thus we reject Williams's generalized contention that the trial court abused its discretion in admitting evidence of wrongdoing committed in the Horizon partnership.

We also reject Williams's contention that as to two specific pieces of Horizon evidence, the trial court erred in overruling his objections. The evidence, which showed that Williams obtained three Horizon lots for less than their fair market value and that Williams had attempted to convince Marsch that he shared control over his living trust with other trustees, when in fact Williams was the only trustee, were relevant because they showed Williams's desire to obtain sole control over Horizon and his pattern of dishonest dealing with Marsch.

Williams's suggestion that Marsch's position in the *Marsch II* appeal somehow estopped Marsch from presenting Horizon evidence in this case is also unpersuasive. The only issue presented in *Marsch II* was whether the La Jolla partnership disputes were subject to arbitration. As

we pointed out in our opinion in *Marsch II*, the potential admissibility of evidence of wrongdoing in Horizon did not create any right of arbitration of the La Jolla disputes. (*Marsch II, supra,* 223 Cal.App.4th at p. 257.) Having obtained no ruling based on any limitation on the evidence he would present, Marsch was not estopped to offer such evidence. (See *Coleman v. Southern Pacific Co.* (1956) 141 Cal.App.2d 121, 128.)

Finally, we note the trial court instructed the jury the claims before it were limited to the La Jolla Partnerships, the claims relating to the Horizon partnership had previously been resolved, evidence relating to Horizon could be considered only as it related to conduct and intent in the La Jolla partnerships and damages could not be awarded for the parties' conduct in connection with Horizon. Absent evidence to the contrary, we are required to presume the jury followed these instructions. (*Clemens v. Regents of University of California* (1970) 8 Cal.App.3d 1, 9.) In light of these instructions, and their presumed impact on the jury, we are in no position to find that the Horizon evidence nonetheless prejudiced resolution of the La Jolla claims.

2. Collateral Estoppel

Williams moved in limine to exclude reference to the Horizon arbitrators findings against him. The trial court granted Williams's motion but indicated that if Williams presented evidence which attempted to contradict clear factual findings made by the arbitrators, the court would consider instructing the jury that, under principles of collateral estoppel, the arbitrators' findings were binding.

Although the trial court never gave an instruction on the arbitrators' findings, Williams argues that the threat of the instruction prevented him from having a fair opportunity to rebut Horizon evidence offered by Marsch.

We have some difficulties with Williams's approach. First, Williams did not make a record in the trial court with respect to what specific evidence he would have offered in the absence of the trial court's provisional ruling on the collateral estoppel issue. Thus, even if we agreed that he was improperly prevented from offering evidence which contradicted the arbitrator's findings, we would have no means of determining whether such an error prejudiced him. (See Cal. Const., art VI, § 13; *People v. Watson* (1956) 46 Cal.2d 818, 837.)

Secondly, we are not convinced that the trial court would have committed an error had it made good on its threat and given collateral estoppel effect to the arbitrators' findings. Although we agree that the issue has not been settled definitively,[4] we think application of collateral estoppel is more consistent with the expectations of parties who have agreed to arbitration as a means of quickly and economically resolving their disputes. (See *Sartor v. Superior Court* (1982) 136 Cal.App.3d 322, 327-328; *Conner v. Dart Transportation Service* (1976) 65 Cal. App.3d 320, 323-324.) Denying collateral estoppel effect to arbitral findings would severely undermine the presumed intent of the parties that arbitration will conclusively resolve their disputes. (See *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 9.)

In sum then we must reject Williams's contention that the trial court's collateral estoppel ruling prevented him from fairly presenting his defense.

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[4] Compare *Vandenberg* v. *Superior Court* (1997) 59 Cal.App.4th 898, 907-908, review granted March 25, 1998 [98 Daily Journal D.A.R. 3022] [no collateral estoppel effect because of informal procedure and lack of right to appeal] and *Kelly* v. *Vons Companies, Inc.* (1998) 67 Cal.App.4th 1329 [collateral estoppel for arbitration findings appropriate because parties in agreeing to arbitration parties expect final resolution by arbitrator, not relitigation in another forum]

In addition to arguing that he was prevented from presenting a complete defense, Williams also contends that the trial court's collateral estoppel ruling compelled one of his principal witnesses to concede that Williams had acted improperly in the Horizon partnership. According to Williams, the witness was concerned that if he contradicted any of the arbitrators' findings, those findings would be admitted. Again, we have difficulty with Williams's approach. First, we have no evidence to support counsel's speculation as to the witness's thought processes. Secondly, we are not at all comfortable with the notion of granting Williams relief because one of his witnesses gave untruthful testimony out of fear as to how the trial court would react. (See *Mesecher v. County of San Diego* (1992) 9 Cal.App.4th 1677, 1686 [tactical choices are not grounds for appellate relief].) Finally, we note that on redirect the witness testified that he did not believe Williams put pressure on Marsch as means of stealing Horizon. In light of the redirect, it is difficult to credit Williams's contention that the trial court provisional ruling somehow compelled adverse testimony with Williams's witness.

3. Unclean Hands

Williams argues he established Marsch was guilty of unclean hands as a matter of law and that the trial court erred both in failing to enter judgment in his favor on those grounds and in refusing to give the jury an unclean hands instruction. Williams bases his unclean hands defense on three circumstances: he contends that at the time T&C acquired its interest in the La Jolla properties, Marsch misrepresented the status of a bank's lien against his interest in the buildings; he contends that Marsch failed to fulfill the financial guarantees he had provided to T&C at the time T&C acquired Patricia Marsch's interest in the

buildings; and he contends Marsch converted partnership funds to his own use. We find no error. Marsch's conduct does not entirely bar his claims because Marsch's alleged misconduct is not directly related to Williams own alleged wrongdoing.

The doctrine of unclean hands was discussed at some length by the court in *Blain v. Doctor's Co.* (1990) 222 Cal.App.3d 1048, 1058-1060: "Whether the facts pleaded state a cause of action turns on the law of unclean hands. We take our initial bearings from a general overview of the law. Professor Chafee commences his insightful discussion of the law with the following caveat. 'The most amusing maxim of equity is "He who comes into Equity must come with clean hands." It has given rise to many interesting cases and poor jokes.' (Chafee, *Coming Into Equity With Clean Hands* (1949) 47 Mich. L.Rev. 877, hereafter *Chafee, Clean Hands I.*) As Chafee explains, the doctrine of clean hands is not one but a number of disparate doctrines, dependent for their substance upon the context of application. "*First*, the clean hands maxim is not peculiar to equity, but is simply a picturesque phrase applied by equity judges to a general principle running through damage actions as well as suits for specific relief. This principle is that the plaintiff's fault is often an important element in the judicial settlement of disputes, as well as the defendant's fault. [¶] *Second*, this principle of plaintiff's fault has rather weak unifying qualities. It can better be described as a string around a loose bundle of separate defenses which somewhat resemble each other. This resemblance may occasionally render analogies helpful, but more significant is the way the effect given to the plaintiff's misconduct depends on the nature of his wrong and on the nature of the defendant's wrong. In other words, this vague single principle gets most of its qualities in a given group of cases from the substantive

law of the particular subject. It is largely shaped by the human practices and public policies involved in the situation." (Chafee, *Coming Into Equity With Clean Hands: II* (1949) 47 Mich. L.Rev. 1065, 1091-1092, hereafter *Chafee, Clean Hands II.*)

" . . . .

"This subject is also generally addressed in the Restatement Second of Torts. Section 889 expresses the doctrine of unclean hands as a bar to recovery in tort as follows. 'One is not barred from recovery for an interference with his legally protected interests *merely* because at the time of the interference he was committing a tort or a crime . . . .' (Italics added.) The question of course is what counts as 'merely?' The comments to the section are unilluminating. The topic of clean hands is also addressed in section 940, which pertains to the denial of injunctive relief against tortious conduct on the ground of plaintiff's related misconduct. The section identifies the matters to be considered as the connection of the misconduct to the controversy and the nature of plaintiff's interests. It suggests that the defense may be [appropriate], 'if the misconduct relates directly to the controversy immediately involved in the injunction suit and is of a character that renders the plaintiff's interests undeserving of injunctive protection.' (*Id.*, com. b, p. 579.)

"We glean from this sparse product that whether there is a bar depends upon the analogous case law, the nature of the misconduct, and the relationship of the misconduct to the claimed injuries."

In *Blain v. Doctor's Co.* the plaintiff, a physician, was allegedly asked to lie at a deposition by an attorney retained by his malpractice insurer. The physician followed the lawyer's advice, his lie was discovered, and he alleged that as a result he suffered emotional distress and loss

of his ability to practice medicine. The court held that the physician could not thereafter sue the attorney or the insurer as a result of the damage caused by his own lie. (*Id.* at pp. 1063-1064.) "A doctor who lies under oath about the incident for which he is being sued must know that if the lie is discovered it will adversely affect his defense. Finally, the relationship of misconduct to harm in this case is direct and not incidental. The misconduct was, so it is alleged, the instrumentality of harm." (*Blain v. Doctor's Co., supra,* 222 Cal.App.3d at p. 1063.)

In contrast to the result reached in *Blain v. Doctor's Co.,* in *Fibreboard Paper Products Corp. v. East Bay Union of Machinists* (1964) 227 Cal.App.2d 675, 677, the court held that the alleged fraud in the inducement of a collective bargaining agreement and alleged breaches of the agreement did not prevent an employer from collecting damages caused when union members established an unlawful picket line and interfered with the employer's ability to conduct business. Although recognizing that unclean hands was a defense to a claim for damages, the court stated: "It is equally well settled in this state, however, that it is not every wrongful act nor even every fraud which prevents a suitor in equity from obtaining relief. The misconduct which brings the clean hands doctrine into operation must relate directly to the transaction concerning which the complaint is made, i.e., it must pertain to the very subject matter involved and affect the equitable relations between the litigants. Accordingly, relief is not denied because the plaintiff may have acted improperly in the past or because such prior misconduct may indirectly affect the problem before the court. [Citations.] As was said in *Moriarty v. Carlson, supra,* 184 Cal.App.2d at page 51: '"The misconduct must infect the cause of action before the court . . . A party may have relief in connection with a transaction it-

self untainted by improper conduct. . . .'" (P.57.) And in *Boericke v. Weise, supra,* 68 Cal.App.2d 407, 419, the court said: 'Of course if a party comes into a court of equity with unclean hands relating to the transaction before the court, he will be denied relief. But in determining that issue the trial court can properly consider only whether the moving party has clean or unclean hands in relation to the matters properly before the court. The trial of the issue relating to clean hands cannot be distorted into a proceeding to try the general morals of the parties.' Applying these principles to the case at hand, we find that the assertion of unclean hands is not directed to the 'transaction' before the court in the instant case. That transaction involves whether defendants were guilty of tortious conduct. It would amount to a straining of the doctrine to hold that defendants could escape liability for tort because Fibreboard breached its contract or because it was guilty of fraudulent misrepresentations. The wrong done to Fibreboard, which is the basis of its cause of action for damages, is independent of the transaction arising from the alleged breach of contract or misrepresentations. To hold otherwise would be to sanction an assault upon a person who has perpetrated a fraud upon or breached a contract with the assaulter. Retribution for Fibreboard's breach of contract or fraudulent misrepresentations, if such existed, cannot be vindicated under the doctrine of unclean hands. Accordingly, the trial court did not abuse its discretion in denying the subject amendment." (*Fibreboard Paper Products Corp. v. East Bay Union of Machinists, supra,* 227 Cal.App.2d at pp. 727-728.)

These cases amply exemplify the general principle that a plaintiff may not recover tort or contract damages caused by his own wrongdoing. (See Civ. Code, § 3517.) Indeed, this principle was recently reiterated by our Supreme Court when, in the context of holding that a crim-

inal defendant must demonstrate actual innocence in order to recover damages from a negligent attorney, the court stated: "Our legal system is premised in part on the maxim, 'No one can take advantage of his own wrong.' [Citations.]" (*Wiley* v. *County of San Diego* (1998) 19 Cal.4th 532, 538-539.) However, the cases also exemplify the corollary that the bar to recovery arises only in those cases where, like the doctor in *Blain* v. *Doctor's Co.*, the plaintiff is attempting to spread the cost of his own wrongdoing to others. Where, as in *Fibreboard*, an injured plaintiff may be guilty of antecedent and even somewhat related wrongdoing, the plaintiff is not prevented from recovering for separate wrongs committed by a defendant.

The record here places Marsch's claims plainly in the latter category. Marsch established to the satisfaction of the jury that from the outset Williams planned to interfere in Marsch's ability to protect his interest in the La Jolla commercial buildings as a means of compelling Marsch to give up his interest in the potentially lucrative Horizon project. Suffice it to say, there is no evidence in the record that Marsch in any manner participated in Williams's unreasonable and unwarranted destruction of his own interest in the La Jolla partnerships. Marsch's alleged misrepresentation of the bank's lien, breaches of contract and conversion of partnership funds, were not connected to or otherwise the instrumentalities of the harm Williams caused.

In this regard we think it is also important to recognize that with respect to Marsch's alleged misrepresentation, breach of contract and conversion, Williams could and did vindicate those interests by way of the cross-complaint he asserted against Marsch. As we have indicated, the jury found Marsch liable for conversion but returned verdicts in his favor on Williams's fraud and breach of con-

tract claims. Where, as here, a plaintiff's alleged wrongdoing is the subject of separate causes of action in a cross-complaint, and the factfinder by way of considering the merits of those claims had ample opportunity to adjust the overall equities between the parties, it is difficult to identify any unfairness that nonetheless resulted by virtue of the trial court's unwillingness to permit use of those affirmative claims as a complete bar to plaintiff's recovery.

4. Statute of Limitations

In response to a question from the jury, the trial court instructed the jury it could find Marsch's fraud claim was timely if the "last act" in furtherance of the continuing fraud occurred within three years before Marsch filed his claim. The instruction was based on the following statement from *Wyatt* v. *Union Mortgage Co.* (1979) 24 Cal.3d 773, 788: "When, as here, the underlying fraud is a continuing wrong, a convincing rationale exists for delaying the running of the statute of limitations. Just as the statute of limitations does not run against an action based on fraud so long as the fraud remains concealed, so ought the statute to be tolled *even after the fraud is discovered, for so long as the sheer economic duress or undue influence embedded in the fraud continues to hold the victim in place.*" (Fn. omitted.)

Williams argues this instruction is only appropriate in cases of civil conspiracy and that because the trial court had previously dismissed Marsch's conspiracy lawsuit, the instruction was improper. We do not entirely accept Williams premise. The court in *Wyatt* v. *Union Mortgage* expressly declined to decide whether a "last act" instruction is proper in a case of continuing fraud committed by a single individual rather than as part of a civil conspiracy (23 Cal.3d at p. 788, fn. 5), and we have found no

cases which directly accept or reject extension of *Wyatt* to fraud committed by individuals. (See e.g. *DeRose* v. *Carswell* (1987) 196 Cal.App.3d 1011, 1029.)

However in this case we do not consider whether extension of *Wyatt* is appropriate because in response to a special verdict question the jury found Marsch had filed his fraud claim within three years of *discovery* of the facts constituting the fraud. Thus, as Marsch points out, the jury did not need to rely upon the "last act" instruction to find Marsch's fraud claim was timely.

We also note that in addition to finding Williams liable for fraud, the jury also found that he was liable for breach of fiduciary duty which the parties agreed has a four-year limitation period running from discovery. (Code Civ. Proc., § 343; 3 Witkin, Cal.Procedure, Actions, § 618-619.) There is ample evidence in the record here to support the jury's implied conclusion that Marsch did not discover Williams's breach of duty to the La Jolla partnerships until the later half of 1988, well within four years of his July 1992 complaint. In particular, we note that Marsch testified that it was not until December 1988 that he concluded that Williams was attempting to sabotage the partnerships and having reached that conclusion stopped making guaranty payments to T&C. Williams's liability for breach of fiduciary duty fully supports both the compensatory and punitive damage awards. (See *Delos* v. *Farmers Group, Inc.* (1979) 93 Cal.App.3d 642, 657; *Sequoia Vaccum Systems* v. *Stransky* (1964) 229 Cal.App.2d 281, 289.)

C. *Compensatory Damages*

Williams argues that there was no basis for the $11.5 million compensatory damage award. Again we disagree.

Marsch presented an expert who had conducted a study of the La Jolla commercial real estate market over a six-year period; the study included an occupancy and lease rate history of twenty-seven buildings in the La Jolla area. The expert concluded that the buildings represented a secure investment for which investors would only expect a 8.3 percent return; based on his opinion of the rental market in 1988, he concluded that in 1988 the buildings could have been sold for $26 million or more. Based on the range of potential sales prices, a second expert estimated that Marsch's losses were in the neighborhood of $11 million.

However, Marsch's expert also testified an institutional investor may have been willing to accept a rate of return as low as seven percent. This rate of return would have raised the price such an investor was willing to pay and hence the amount of Marsch's damage to an amount substantially in excess of $11 million. Thus we reject Williams's argument that we must reverse at least $500,000 of the compensatory damages awarded by the jury.

We also reject his criticism of the remaining $11 million in compensatory damages. Although on appeal Williams criticizes the methodology of the experts, in particular the reliance on rent rolls which did not reflect a vacancy and a rent default and the experts' failure to consider inadequate on site parking, at trial Williams was certainly free to bring these defects to the jury's attention and rebut them by way testimony from his own experts. However, in reviewing damages on appeal we are not in a position to require the level of certainty as to amount Williams supposes. Rather, we are governed by the general principle that while a tort plaintiff must show with some certainty that the defendant's conduct caused harm, the defendant's own conduct may make it difficult for the

plaintiff to show with certainty the exact amount of damage. (*Clemente* v. *State of California* (1985) 40 Cal.3d 202, 219.) Here, Williams's refusal to permit a sale or refinance of the La Jolla buildings places this case squarely in that category. Thus, given the expert testimony which supports the compensatory damage award, we find no basis upon which to disturb the jury's verdict.

DISPOSITION

The judgment is affirmed except that the punitive damage award herein is vacated and the matter is remanded for a new trial on that issue only, provided that if, within 30 days from the date of our remittitur, respondent shall file with the clerk of this court and serve upon appellant a written consent to a reduction of the punitive damage award to the sum of $28.155 million, the judgment will be modified to award respondent punitive damages in that amount, and as so modified affirmed in its entirety. (*Burnett* v. *National Enquirer, Inc., supra*, 144 Cal.App. 3d at p. 1019.)

Respondent to recover his costs of appeal.

/s/ Benke
BENKE, J.

WE CONCUR:

/s/ Kremer
KREMER, P.J.

/s/ McDonald
McDONALD, J.

APPENDIX C

[Filed Feb. 9, 1999]

COURT OF APPEAL
FOURTH APPELLATE DISTRICT
DIVISION ONE
STATE OF CALIFORNIA

D029175
(Super. Ct. No. 654159)

NICOLAS MARSCH III,
Plaintiff and Respondent,

v.

RONALD WILLIAMS *et al.*,
Defendants and Appellants.

THE COURT:

The petition for rehearing is denied.

/s/ Kremer
KREMER, P.J.

APPENDIX D

[Filed Jun. 27, 1997]

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN DIEGO

Case No. 654159

NICOLAS MARSCH, III,
Plaintiff,

vs.

RONALD WILLIAMS, *et al.*,
Defendants.

ORDER AFTER HEARING

Defendants' motion for remittitur came on for hearing on June 20, 1997, in Department 45 of the above-entitled court, the Honorable Robert J. O'Neill, judge presiding. Having considered all oral and written arguments and having taken the matter under submission, the Court rules as follows:

Reviewing the entire record in the light most favorable to the judgment, the Court finds no basis to conclude the award was rendered as the result of passion or prejudice, or under the unique circumstances of this case, that it is excessive.

The record reflects defendant Williams set about a deliberate, calculated scheme to steal two business opportunities brought to him by his partner. Williams, by the

callous use of his superior economic power and through abuse of the trust and confidence reposed in him by his partner and in blatant violation of his fiduciary responsibility in the La Jolla partnership, denied Marsch the benefits of the partnership relationship. Williams deliberately undertook an effort to break Marsch financially so that he would then be able to step in and "steal the deal."

It was well within the evidence for the jury to find Williams deceitful and to find his testimony in court willfully and deliberately false. Ample evidence supports the conclusion he consistently lied to his partner about the reasons he would not cooperate with him in the conduct of the partnership business. Despite heroic efforts on the part of his lawyer to attempt to present Williams in a favorable light, Williams cynical disdain for the court process, the jury and anyone who dared question him was apparent. The jury who observed the manner and character of his testimony and his attitude toward the action was well justified in concluding Williams was a fraud. An award of substantial punitive damages was appropriate.

The evidence viewed in the light most favorable to the verdict established Williams' net worth without considering the Horizon project to be $187.7 million. The present value of the future revenue stream from the project was valued at between $90 and $111.8 million, depending on the capitalization rate chosen by the jury. (These figures were based on a projected cash flow of $173 million.) Thus, the jury could have, at a minimum, determined the benefit obtained by Williams through his misdeeds to be $90 million. It is likely more than coincidence the jury fixed punitive damages at one half that amount, a sum reasonably approximating his ill-gotten gains.

This Court finds it reasonable and appropriate for the jury in such an egregious case to conclude that Williams should not profit from his theft. Certainly, there would be little deterrent effect to either Mr. Williams or others inclined to such perfidy, if the worst he was required to do when caught with his hand in the cookie jar was to put back the cookie. Yet, in fact, that is all this jury required. Even after the award of punitive damages, Williams, by the evidence submitted in this case, stands to realize a profit of between $45 million and $56 million from the business venture he stole from his partner.

While $45 million is a huge amount of money, it must be viewed in the context of the stakes for which this game was played and it must be considered in the context of the ability of the players to stay in the game. The evidence establishes Williams wealth at approximately $200 million, a sum which will be enhanced significantly when the Horizon project is sold. While he represented his wealth to be considerably less at trial ($97 million), declarations filed with this Court in connection with this motion but not presented to the jury, reflect Williams' representation to the Bankruptcy Court in the bankruptcy proceeding filed immediately after the verdict, that his net worth is $235 million.

It is evident the jury felt awarding Marsch compensatory damages of more than $11 million in the La Jolla partnership case without a further message to Williams and others who use their economic power to abuse and overwhelm their partners and the legal system would be to declare him victorious in his war of attrition against his partner. The Court agrees.

The La Jolla partnership was, from the beginning, a means to an end. Total ownership of the Horizon project was the end. By strangling his partner in the La Jolla

partnership, Williams knew he could loosen his hold on the real prize, Horizon. He was right. The jury apparently believed it would be unfair to allow Williams to profit any more from his perfidy than he was entitled to under his agreement. This, despite the size of the numbers, seems a moderate and reasoned conclusion.

The Court has examined the ratios of the punitive damage award to the compensatory damages, 4:1, and the punitive damages award to defendants net worth, approximately 1:4 or 1:5 depending on the numbers selected by the jury. These ratios while punishing are not unprecedented. This Court will not criticize the decision of this diligent and thoughtful jury. The defendants' motion for remittitur is denied.

Dated: Jun. 27, 1997

/s/ Robert J. O'Neill
ROBERT J. O'NEILL
Judge of the Superior Court

APPENDIX E

[Filed Jun. 13, 1997]

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN DIEGO

Number 654159

NICOLAS MARSCH, III,
Plaintiff/Petitioner

vs.

RONALD WILLIAMS,
Defendant/Respondent

This matter having come before the court this date, the court orders:

Motion for judgment notwithstanding the verdict denied. Motion for new trial as to liability denied. Motion for new trial, or alternatively, remittitur as to compensatory damages denied. Motion for new trial as to punitive damages denied. Motion for remittitur as to punitive damages set for oral hearing on Friday, June 20, 1997 at 3:00 pm.

Dated: 06/13/97 /s/ Robert J. O'Neill
Judge of the Superior Court

APPENDIX F

[Filed Apr. 28, 1997]

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO

Case No. 654159

NICOLAS MARSCH, III,
Plaintiff,

v.

RONALD WILLIAMS, PALO ALTO TOWN & COUNTRY VILLAGE, INC., the RONALD WILLIAMS LIVING TRUST, R. MICHAEL MURPHY, CALIFORNIA STRUCTURES, INC., VICTORIA GRAY and DOES 1 through 100, inclusive,
Defendants.

And All Related Cross-Actions

JUDGMENT ON JURY VERDICT

This action came on regularly for trial on March 3, 1997, in Department 45 of the Superior Court, the Hon. Robert J. O'Neil Judge presiding; the plaintiff appearing by attorney Charles D. Maurer, Jr. of the Maurer Law Firm and defendants appearing by attorneys Daniel M. White of White, Gentes & Garcia and David Kays of Ritchey, Fisher, Whitman & Klein.

A jury of twelve (12) persons was regularly impaneled and sworn. Witnesses were sworn and testified. After hearing the evidence and arguments of counsel, the jury was duly instructed by the Court and the cause was submitted to the jury with directions to return a verdict on special issues. The jury deliberated and thereafter returned into court with its verdict as follows:

1. On the Complaint of Nicolas Marsch, III:

We, the jury in the above entitled action, find the following special verdict on the questions submitted to us:

Question No. 1:

Did defendant Palo Alto Town & Country Village, Inc. breach a fiduciary duty owed to plaintiff Nicolas Marsch, III?

	Yes	No
As to the Wall Street Partners partnership?	X	—
As to the La Jolla Commercial Associates partnership?	X	—

If you answered "no" as to *both* partnerships, please go to Question No. 3. If you answered "yes" as to *either* partnership, please answer the next question.

Question No. 2:

Was the breach of fiduciary duty a legal cause of damage to plaintiff Nicolas Marsch, III?

	Yes	No
As to the Wall Street Partners partnership?	X	—
As to the La Jolla Commercial Associates partnership?	X	—

When you have answered Question No. 2, please answer the next question.

Question No. 3:

Did defendants Palo Alto Town & Country Village, Inc., the Ronald William's Living Trust, Ronald Williams, or any of them, defraud plaintiff Nicolas Marsch, III?

Answer "yes" or "no."

Answer: *Yes*

If you answered Question No. 3 "no." please go to Question No. 5. If you answered Question No. 3 "yes," please answer the next question.

Question No. 4:

Was the fraud a legal cause of damage to plaintiff Nicolas Marsch, III?

Answer "yes" or "no."

Answer: *Yes*

When you have answered Question No. 4, please answer the next question.

Question No. 5:

Did defendants Palo Alto Town & Country Village, Inc., the Ronald Williams Living Trust, Ronald Williams, or any of them, breach a contract with plaintiff Nicolas Marsch, III?

	Yes	No
As to the Wall Street Partners partnership?	X	—
As to the La Jolla Commercial Associates partnership?	X	—

If you answered *either* Question Nos. 1 or 2 "no" as to both partnerships and you answered either Question Nos. 3 or 4 "no," and you answered Question No. 5 "no" as to both partnerships, please sign and return this verdict. If you answered Question No. 5 "yes," please answer the next question.

Question No. 6:

Was the breach of contract a legal cause of damage to plaintiff Nicolas Marsch, III?

	Yes	No
As to the Wall Street Partners partnership?	X	—
As to the La Jolla Commercial Associates partnership?	X	—

If you answered either Question Nos. 1 or 2 "no" as to both partnerships and you answered either Question Nos. 3 or 4 "no" and you answered either Question Nos. 5 or 6 "no" as to both partnerships, please sign and return this verdict.

If not, please answer the next question.

Question No. 7:

What do you find to be the total amount of damages suffered by Nicolas Marsch, III?

$11,500,000.00

If you answered either Question Nos. 2 or 4 "yes" as to *either* partnership, please answer the next question. If not, please sign and return this verdict.

Question No. 8:

Do you find by clear and convincing evidence that defendants Palo Alto Town & Country Village, Inc., the

Ronald Williams Living Trust, or Ronald Williams, or any of them, acted toward plaintiff Nicolas Marsch, III, with fraud, oppression or malice?

Answer "yes" or "no."

Answer: *Yes*

When you have answered Question No. 8, please sign and return this verdict.

Date: *4/3/97* *Dorothy Cooper*
Foreperson

2. On the Cross-Complaint of Defendants and Cross-Complainants Palo Alto Town & Country Village, Inc., The Ronald Williams Living Trust, and Ronald Williams

We, the jury in the above entitled action, find the following Special Verdict on the questions submitted to us:

Question No. 1:

Did Cross-Defendant Nicolas Marsch, III, defraud Cross-Complainants or any of them?

Answer "yes" or "no".

Answer: *No*

If you answered Question No. 1 "no", please go to Question No. 3. If you answered Question No. 1 "yes", please answer the next question.

Question No. 2:

Was the fraud a legal cause of damage to Cross-Complainants, or any of them?

Answer "yes" or "no".

Answer: _____

When you have answered Question No. 2, please answer the next question.

Question No. 3:

Did Cross-Defendant Nicolas Marsch, III, breach his fiduciary duties to Cross-Complainants, or any of them?

Answer "yes" or "no".

Answer: *Yes*

If you answered Question No. 3 "no", please go to Question No. 5. If you answered Question No. 3 "yes", please answer the next question.

Question No. 4:

Was the breach of fiduciary duty a legal cause of damage to Cross-Complainants, or any of them?

Answer "yes" or "no".

Answer: *No*

When you have answered Question No. 4, please answer the next question.

Question No. 5:

Did Cross-Defendant Nicolas Marsch, III, breach a contract with Cross-Complainants, or any of them?

Answer "yes" or "no".

Answer: *Yes*

If you answered Question No. 5 "no", please go to Question No. 7. If you answered Question No. 5 "yes", please answer the next question.

Question No. 6:

Was the breach of contract a legal cause of damage to the Cross-Complainants, or any of them?

Answer "yes" or "no".

Answer: *Yes*

When you have answered Question No. 6, please answer the next question.

Question No. 7:

Did Cross-Defendant Nicolas Marsch, III, convert the property of Cross-Complainants, or any of them?

Answer "yes" or "no".

Answer: *Yes*

If you answered Question No. 7 "no", please go to Question No. 9. If you answered Question No. 7 "yes", please answer the next question.

Question No. 8:

Was the conversion a legal cause of damage to Cross-Complainants, or any of them?

Answer "yes" or "no".

Answer: *Yes*

If you have answered "yes" to any combination of Question Nos. 1 *and 2, 3 and 4, 5 and 6 or 7 and 8*, please answer the next question. If not, please sign and return this verdict.

Question No. 9:

What do you find to be the damages suffered by cross-complainants or any of them?

Answer: *$555,100.00*

If you answered "yes" to any combination of Question Nos. 1 and *2, 3 and 4 or 7 and 8*, please answer the next question. If not, please go to Question No. 10.

Question No. 10:

Do you find by clear and convincing evidence that cross-defendant Nicolas Marsch, III acted towards cross-

complainants or any of them with fraud, oppression or malice?

Answer "yes" or "no".

Answer: *No*

If you have found in favor of plaintiff Nicolas Marsch, III on any claim, please answer the next question. If not, please sign and return this verdict.

Question No. 11:

Did plaintiff and cross-defendant Nicolas Marsch, III fail to timely file his claim for breach of contract?

Answer "yes" or "no".

Answer: *No*

When you've answered Question No. 11, please answer the next question.

Question No. 12:

Did plaintiff and cross-defendant Nicolas Marsch, III fail to file his claim for fraud within thre years of discovery of the facts constituting the fraud?

Answer "yes" or "no".

Answer: *No*

When you have answered Question No. 12, please answer the next question.

Question No. 13:

Did plaintiff and cross-defendant Nicolas Marsch, III fail to mitigate his damages?

Answer "yes" or "no".

Answer: *No*

If you answered Question No. 13 "no", please go to question No. 15. If you answered Question No. 13 "yes," please answer the next question.

Question No. 14:

By what percentage did he fail to mitigate his damages?

Answer: __%.

When you have answered Question No. 14, please answer the next question.

Question No. 15:

On what date did plaintiff and cross-defendant Nicolas Marsch, III have sufficient facts available to realize he had a claim against defendants and cross-complainants?

Answer: _____

When you have answered Question No. 15, please sign and return this verdict.

Date: *4/3/97* *Dorothy Cooper*
Foreperson

[Note: The court instructed the jury not to answer question 15 above.]

3. On the Special Verdict Punitive Damages Bifurcated Trial—Phase II

We, the jury in the above entitled action, find the following special verdict on the questions submitted to us:

Question No. 1: Shall punitive damages be assessed against:

Defendant Ronald Williams, Palo Alto Town & Country Village, Inc. and the Ronald Williams Living Trust

Yes	No
X	__

If your answer is "yes", answer the next question. If your answer is "no", have your foreperson sign and date the special verdict.

Question No. 2: We assess punitive damages against Ronald Williams, Palo Alto Town & Country Village, Inc. and the Ronald Williams Living Trust in the following amount:

$45,000,000.00

Dated: 4/7/97 *Dorothy Cooper*
Foreperson

It appearing by reason of said verdict on the Complaint and Special Verdict Punitive Damages Bifurcated Trial Phase II that:

Plaintiff Nicolas Marsch, III is entitled to judgment against defendants Palo Alto Town & Country Village, Inc., the Ronald Williams Living Trust, and Ronald Williams.

And further appearing by reason of said verdict on the cross-complaint that cross-complainants Palo Alto Town & Country Village, Inc. the Ronald Williams Living Trust, and Ronald Williams, are entitled to judgment against cross-defendant Nicolas Marsch, III.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that said plaintiff have and recover from said defendants that sum of $56,500,000.00 with interest thereon at the rate of ten percent (10%) per annum from the date of entry of this judgment until paid, together with costs and disbursements in the amount of $————.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that cross-complainants have and recover from said cross-defendant Nicolas Marsch, III the sum of

$555,100.00 with interest thereon at the rate of ten percent (10%) per annum from the date of entry of this judgment until paid.

DATED: Apr. 28, 1997

/s/ Robert J. O'Neill
ROBERT J. O'NEILL
Judge of the Superior Court

APPENDIX G

[Filed Dec. 18, 1997]

COURT OF APPEAL
FOURTH APPELLATE DISTRICT
DIVISION ONE
STATE OF CALIFORNIA

D026747, D026916
(Super. Ct. No. N48177)

NICOLAS MARSCH III *et al.*,
Plaintiffs and Appellants,

v.

RONALD WILLIAMS *et al.*,
Defendants and Respondents.

APPEAL from orders of the Superior Court of San Diego County, Lisa Guy-Schall, Judge. Dismissed in part; affirmed in part.

This case concerns the circumstances under which a partnership receiver may permit a creditor of a dissolving partnership to use a credit bid at the sale of partnership assets. As we explain in greater detail below, at such a sale there is nothing inherently improper, unfair or oppressive in use of a credit bid by bona fide creditors of the entity in receivership. Moreover, there is nothing in the record here which takes this case out of the general rule permitting use of credit bids. Accordingly, we affirm

an order confirming the sale of partnership assets to a creditor of the partnership who submitted the only bid for partnership assets.

FACTUAL BACKGROUND

This is not the first time we have had occasion to visit the dispute which gives rise to this appeal. We fully set forth the factual circumstances underlying the respective claims of appellant Nicholas Marsch III [1] and respondent Ronald Williams [2] in our prior opinion in *Marsch v. Williams* (1994) 23 Cal.App.4th 238, 240-242 (*Marsch I*):

"In January 1985 Marsch formed a California corporation called New Horizon Group, Inc. (New Horizon), and purchased a 400-acre parcel of land in Rancho Santa Fe California for $11.4 million. Additional purchases by New Horizon and its successor increased the size of the parcel to 541 acres. Marsch planned to build a golf course and develop approximately 240 luxury home sites on the land.

"Later in 1985 Marsch realized the New Horizon project needed a financial partner with substantial assets. Marsch was introduced to Williams, a wealthy man with many years' experience in real estate and golf course development. After discussing the project with Williams, Marsch agreed to sell Williams 50 percent of New Horizon's stock for $25,000. According to Marsch, Williams also promised to arrange all further financing for the project.

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1 NHG, Inc., is also an appellant; unless otherwise indicated, all further references to Marsch include NHG, Inc.

2 Ronald Williams Living Trust and Palo Alto Town & Country are also respondents; unless otherwise indicated, all further references to Williams include these entities.

"In December 1986 Marsch and Williams agreed to reorganize the New Horizon project. They created the Horizon Properties general partnership (Horizon) by way of a December 18, 1986, partnership agreement. This agreement, which became effective January 1, 1987, contained a binding arbitration clause. In February 1987 Marsch and Williams dissolved New Horizon and transferred its assets to Horizon. Marsch and Williams were the only partners of Horizon and each owned a 50 percent share in the partnership.

". . . .

"The early years of Marsch and Williams's association were marked by good faith and cooperation. However, in 1988 Marsch and Williams began to have disagreements about how to best proceed with the Horizon project. Marsch alleges it was during this time that Williams conceived a scheme to steal Marsch's interest in Horizon. The essence of this alleged scheme was for Williams to place such financial pressure on Marsch that he would sell his interest to Williams at Williams's price. Marsch claims Williams pursued this objective on two fronts: (1) Williams delayed funding and otherwise obstructed the Horizon project so as to make timely completion impossible, and (2) Williams undermined two other partnerships he and Marsch controlled by refusing to cooperate in the sale or refinancing of buildings in La Jolla the partnerships owned.

"Throughout 1988 and 1989 the relationship between Marsch and Williams continued to deteriorate. The Horizon project was delayed as the partners disagreed on, among other matters, the development schedule, the sale and pricing of lots, the amount of funding necessary for the project and the use of partnership funds by Marsch. Work on Horizon stopped in February 1990." (Ibid., fns. omitted.)

ARBITRATION

Marsch sued Williams in 1990 and his claims were subject to arbitration. As we explained in *Marsch I:* "The arbitration proceeding took place in Palo Alto, California, before a 3-member panel, took 10 months to complete and consumed 88 trial days.

"The Panel issued its award and reasoned opinion of award on June 18, 1992. It found that '[Williams] decided that he wanted to buy out [Marsch] on [Williams's] terms, that the way to accomplish this was to keep [Marsch] in a financially strapped situation, and therefore [Williams] determined to delay completion in order to avoid selling lots and memberships. Such conduct is a breach of [Williams's] fiduciary duty." (23 Cal.App.3d at p. 242.) The Panel found this breach of fiduciary duty inflicted nearly $48.5 million worth of damage on Horizon and ordered Williams to pay Horizon that amount. However, the Panel permitted Williams to offset this judgment against the $70 million Horizon owed Williams and the Williams Trust. The Panel also appointed one of its members as receiver to supervise the sale of the Horizon property and the dissolution of the partnership.

In *Marsch I* we affirmed the arbitrators' resolution of the merits of the parties' dispute. We rejected Marsch's contention the arbitrators should have permitted him to take possession of partnership assets under Corporations Code section 15038. However, we reversed the Panel's appointment of a receiver. We found that given their drastic powers, receivers must be appointed and supervised by the superior court. (*Marsch I, supra,* 23 Cal.App.4th at p. 248.)

RECEIVER'S SALE

Following our remand, the trial court appointed a receiver who was instructed to sell the partnership prop-

erty in accordance with the terms of the arbitration award. On August 31, 1995, the court discharged the first receiver it had appointed, and on September 12, 1995, the trial court appointed a second receiver, respondent Douglas Wilson, who had been nominated by Marsch.

Wilson set a sale date of February 21, 1995. Wilson set a minimum bid of $21.15 million. The minimum bid was determined by adding the $16 miliion value determined in an August 1995 appraisal of the partnership property to the $2.95 million initial purchase price of three lots conveyed to the receiver by Williams after the appraisal and $2.2 million owed to third party creditors. The appraisal was prepared by MAI [3] appraisers and included a 106-page report on the project including a detailed description of the methodology the appraisers employed in reaching their conclusion as to value.

Wilson also permitted Williams to credit bid the $56 million which was the amount the partnership owed him under the arbitration award. Because Wilson found that under the arbitration award the $2.2 million owed to third party creditors had priority over Williams, Wilson required that any bid by Williams include that amount in cash.

On February 21, 1996, shortly before the sale was scheduled to take place, Marsch filed an involuntary bankruptcy petition against the partnership and the sale was stayed. On March 27, 1996, Marsch's bankruptcy petition was dismissed.

On April 3, 1996, Marsch advised Wilson he believed it was improper to permit Williams to credit bid the

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[3] "MAI" indicates the appraisers are Members of the Appraisal Institute. Members must meet the rigorous educational and training qualification of the institute, which is the leading accreditation organization in the appraisal profession.

amount of his judgment. On April 12, 1996, Wilson rejected Marsch's contention. Marsch then filed a motion in the trial court in which he sought an order instructing the receiver to preclude a credit bid. The trial court denied Marsch's motion. Marsch filed a notice of appeal from the order denying his motion.

The partnership property was sold to Williams on May 8, 1996. Wilson had raised the minimum bid to $21,450,000 to account for property taxes incurred while Marsch's bankruptcy petition was pending; for the same reason, Wilson raised by $300,000 the amount of cash required from Williams. Williams paid $2.5 million in cash and a credit of $18,950,000.

Wilson and Williams each moved to confirm the sale. Marsch objected and presented a declaration from a real estate developer who stated that his corporation would have been prepared to bid up to $35 million for the property but that the corporation was unwilling to do so because of the receiver's decision to permit Williams to credit bid the amount of his award. He also submitted a declaration from an investment banker who stated that the large credit bid available to Williams discouraged large institutional investors from participating in the sale. The trial court granted the motion to confirm. Marsch filed a timely notice of appeal from the award confirming the sale.

We consolidated Marsch's appeals from the orders denying his motion to preclude a credit bid and confirming the sale to Williams.

DISCUSSION

I

As a preliminary matter we dismiss Marsch's appeal from the order denying his motion for instructions to the

receiver precluding use of a credit bid. Although in general post-judgment orders are appealable under Code of Civil Procedure section 904.1 (see e.g. *City and County of San Francisco v. Shers* (1995) 38 Cal.App.4th 1831, 1837-1838), they are appealable only when they are themselves final and "not preliminary to later proceedings." (*Lakin v. Watkins Associated Industries* (1993) 6 Cal. 4th 644, 656; *In re Marriage of Levine* (1994) 28 Cal. App.4th 585, 589; *Barnes v. Litton Systems, Inc.* (1994) 28 Cal.App.4th 681, 685.) Here, the order denying Marsch's motion for instructions was preliminary to the sale and the order confirming the sale. The parties concede the order confirming the sale was an appealable order. (See Rutter, *Civil Appeals & Writs*, § 2:125, p. 2-56.) Because it was preliminary to an appealable order, the order denying the motion for instructions was not itself appealable. (*Lakin v. Watkins Associated Industries, supra*, 6 Cal.4th at p. 653.)

It bears noting that Marsch is not appealing an order requiring a sale. Admittedly, had the order requiring a sale been made by the trial court rather than the arbitration panel, such an order would have been appealable as an order requiring "the doing of an act by or against" a party with an interest in the property to be sold. (*Fish v. Fish* (1932) 216 Cal. 14, 16.)[4]

As Williams concedes, our dismissal of the appeal from the order denying the motion for instructions has little practical impact on our disposition of this case because there is no dispute the order confirming the sale is appeal-

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[4] The arbitration panel's order that the partnership property be sold was reviewable on Marsch's appeal from the order confirming the arbitration award. However, as we pointed out in *Marsch I*, review of the arbitration award was limited to the question of whether the arbitrators had exceeded their powers. (*Marsch I, supra*, 23 Cal.App.4th at pp. 244-245.)

able and that we may review the propriety of the credit bid on Marsch's appeal from that order. (See Rutter, *Civil Appeals & Writs, supra,* § 2-125, p. 2-56.)

II

"Judicial confirmation of a receiver's sale rests upon the appointing court's sound discretion exercised in view of all the surrounding facts and circumstances and in the interest of fairness, justice and the rights of the respective parties. [Citation.] The proper exercise of discretion requires the court to consider all material facts and evidence and to apply legal principles essential to an informed, intelligent, and just decision. [Citation.] [The appellate court's] view of the facts must be in the light most favorable to the order and [the appellate court] must refrain from exercising [its] judgment retrospectively. Reversal is warranted only after concluding the trial court abused its discretion by confirming a fraudulent, unfair, or oppressive sale." (*Cal-American Income Property Fund VII v. Brown Development Corp.* (1982) 138 Cal.App.3d 268, 274.)

III

"The established rule in this state is that 'mere inadequacy of price, however gross, is not itself sufficient ground for setting aside a sale legally made. There must, in addition, be proof of some element of fraud, unfairness or oppression before a court will be justified in depriving the purchaser of his legal advantage.'" (*Jones v. Sierra Verdugo Water Co.* (1923) 63 Cal.App. 254, 263.)

Relying on the declaration of Jonathon Jaffe, an officer of Lennar Corporation (Lennar), a Florida-based homebuilder and the declaration of Kent M. Rowett, an investment banker, Marsch argues that he has established that the sale to Williams was fatally flawed. In his declar-

ation, Jaffe stated that as of the time of the hearing on confirmation of the sale, Lennar was willing to pay up to $35 million for the partnership's property so long as Williams was not permitted to credit bid the amount the partnership owed him. Rowett stated the credit bid discouraged institutional buyers and he believed the property had a value in excess of $35 million. Marsch contends these declarations establish both that the price obtained at the sale was inadequate and that the inadequacy was caused by the credit bid procedure adopted by the receiver. We do not accept either of the premises of Marsch's argument.

The initial difficulty we have in accepting Marsch's argument is that the trial court was not required to admit into evidence, let alone adopt, the values set forth in the Jaffe and Rowett declarations. Under Evidence Code section 813, subdivision (a)(1), the value of real property may be shown only by the owner of the property or "[w]itnesses qualified to express such opinions." While a nonowner witness as to value need not be a professional appraiser, his testimony must nonetheless show that his opinion is based on more than the opinion of others; the witness must show that his opinion is based on knowledge of real property values in the area or other information from which value may be deduced. (*City of Pleasant Hill v. First Baptist Church* (1969) 1 Cal.App.3d 384, 412-413.) Although Jaffe's and Rowett's declarations state that each declarant investigated the property, the declarations do not set forth what information led them to conclude the property had a $35 million value. Without some means of determining how Jaffe and Rowett arrived at their respective opinions, the trial court was not required to accept those opinions. (*Ibid.*) Thus, on appeal the trial court can hardly be faulted for instead ac-

cepting the full-blown appraisal and market analysis relied upon by Wilson in setting the minimum bid.

In addition to making no persuasive case on value, Marsch has also failed to show that the sale was influenced by any fraud, unfairness or oppression. The only claim of irregularity asserted by Marsch is his contention Williams should not have been permitted to use a credit bid at the sale. However, in his reply brief, Marsch concedes, as he must, there is nothing inherently impermissible about credit bids. Indeed, credit bids are specifically permitted both by statute and case law. (See Code Civ. Proc., § 701.590, subd. (b); *Lesser & Son v. Seymour* (1950) 35 Cal.2d 494, 502; *Owen v. Cohen* (1941) 19 Cal.2d. 147, 154-155; *Mitchell v. Alpha Hardware etc. Co.* (1935) 7 Cal.App.2d 52, 61.) As our Supreme Court stated: "It is not improper to allow credits to the purchaser on the purchase price for sums owed to him by the receivership estate for it would be idle to pay the money to the receiver and have him pay it back to the purchaser." (*Lesser & Son v. Seymour, supra,* 35 Cal.2d at p. 502.)

Rather than making a general attack on credit bids, Marsch contends use of a credit bid in this case was unfair because it chilled other bidders and because it was inconsistent with the award the arbitration panel made against Williams. In making this argument, Marsch relies heavily upon Jaffe's declaration. However, as to Lennar's actual intention, the Jaffe declaration was in no sense reliable. By the time of the confirmation hearing, Jaffe had in fact submitted three declarations with respect to the Horizon partnership property. The first declaration was submitted in the bankruptcy proceeding in opposition to Williams's motion to dismiss Marsch's bankruptcy petition. In that declaration, dated March 26, 1996, Jaffe stated his

corporation was willing to pay $26 million for the Horizon property but would not do so until the validity of a $12 million equitable lien asserted by Marsch's former counsel had been finally determined. According to Jaffe's March 26, 1995, declaration, the existence of counsel's equitable lien prevented the receiver from conveying insurable title and Lennar "could not have participated in the [February 21, 1996] auction without the ability to obtain insurable title." In response to the first declaration, Williams produced correspondence from Jaffe in which Jaffe, in an effort to disqualify counsel retained by Williams, acknowledged that in the summer of 1995 Lennar had executed an agreement with Marsch which put Lennar "in a position to work with Marsch to acquire the [Horizon] property."

On May 20, 1996, Jaffe submitted a second declaration setting forth Lennar's interest in acquiring the Horizon property. The second declaration was submitted in opposition to the motion to confirm the May 8, 1996, sale. Although the equitable lien had not been resolved by May 8, in his second declaration Jaffe stated his corporation would have been willing to pay $35 million for the Horizon partnership property but for the receiver's decision to permit Williams to use a credit bid. According to Jaffe, the credit bid made it inevitable Williams would obtain the property and therefore it was "imprudent for Lennar to even attend the auction, as that would have necessitated the meaningless arrangement for the availability of funds for a deposit of as much as $35,000,000."

Jaffe's final declaration was submitted to the trial court on the day of the hearing on the motions to confirm the sale to Williams. In that declaration, he stated that "Lennar has a bona fide interest in pursuing acquisition of the project. If the court were to require an auction of the

project for cash, or to solicit cash offers in place of the credit-bid offer accepted by the receiver, Lennar would actively bid for the project." Williams objected to the last declaration on the grounds it was untimely and the trial court sustained the objection.

To summarize then, according to Jaffe, in February the attorneys' equitable lien, not the credit bid, prevented a $26 million bid; however in May the credit bid, not the still-unresolved lien, prevented a $35 million bid. At no point did Lennar offer the receiver or the trial court anything in the way of an earnest money deposit or an undertaking for the costs of any delay in conducting the sale. The variations in Jaffe's position over a relatively short period of time, taken together with Lennar's admitted contractual relationship with Marsch and the absence of any financial undertaking by Lennar, substantially undermine the credibility of Jaffe's statement. Given these circumstances, a trier of fact might conclude Lennar was less interested in paying cash for the property in 1996 and more interested in simply delaying the receiver's sale as a means of assisting Marsch in his dispute with Williams. Thus, the trial court was fully warranted in rejecting Jaffe's statements as proof that at the time of the sale the credit bid kept a bona fide bidder from participating in the sale.

Notwithstanding the weakness of the Jaffe and Rowett declarations, we are certainly willing to accept the proposition that as a practical matter, the potential of a credit bid which *greatly exceeds the value of the property being sold* may have made competing against Williams a daunting task. However, even where, as here, a credit bid exceeds the value of the property being sold, the deterrent impact of the credit bid is no different than the deterrent created by the existence of bidders known to have sub-

stantial resources. Prospective bidders would feel the same chill wind competing against the resources of an investment tycoon or computer software magnate they no doubt experienced attempting to outbid the holder of a large credit bid. Suffice it to say, the existence of well-financed bidders—whether their financing derives from entirely independent sources or by virtue of claims against the seller—does not make a receiver's sale unfair.

This leaves Marsch's contention the use of a credit bid was inconsistent with the arbitrators' award. There are a number of reasons we cannot accept this contention, not the least of which is the fact that when he was before us in *Marsch I*, Marsch argued that in failing to correct the arbitration award to permit him to control the partnership property under the Corporations Code section 15038, the trial court allowed Williams to "place himself in a situation where, *by credit bid on the devalued business*, he can now simply seize the partnership assets for his own, leaving Marsch with nothing." (Italics added.) Needless to say, this statement, in which Marsch appears to have asserted the arbitration award was defective because it permitted a credit bid, is at direct odds with Marsch's current contention the arbitrators' decision to order a sale of the property precluded use of a credit bid. (See 1 Witkin, Cal. Evidence (3d ed. 1986) § 648, p. 633; 9 Witkin Cal. Proc. (4th ed. 1997) § 597, p. 631 [admissions of parties in prior pleadings and briefs may be treated as admission of a legal or factual point].)

In addition to Marsch's own prior statements in this court, our review of the arbitration award itself does not disclose any resolution of the merits which would prevent Williams from using a credit bid. The award specifically affirms the validity of the $70 million partnership note and deed of trust held by Williams and the interest due on the note and permits Williams, at his option, to offset the

amount he owed the partnership against the amount the partnership owed him. Payment of both debts was delayed until sale of the partnership property at which point both debts were simultaneously due. Importantly, in ranking the priority the debt owed to Williams was to receive upon distribution of partnership assets, the arbitrators ordered that the amount due Williams on his secured debt be paid after debts owed to third party creditors but *before* payment of any other debts owing to partners or any distributions of partnership assets to partners. Plainly, the arbitration award does not give the debt owed *by* Williams any priority over the debt owed to Williams such that a credit bid would alter the intention of the arbitrators. Rather, the absolute parity in treatment of the respective debts owed to and by Williams and the priority payment of the notes Williams held was given over any distribution to partners suggests the credit bid advanced rather than undermined the arbitrators' intention.[5]

Moreover, contrary to the suggestion throughout Marsch's briefs, there is nothing in the reasons given by the arbitrators which suggest they determined his conduct was so egregious it undermined his ability to recover from the partnership the amounts he had advanced. In particular, we note that although the arbitration panel found Williams had breached the fiduciary duty he owed the Horizon partnership and that his breach had caused substantial damage to the partnership, it rejected Marsch's request for punitive damages or sanctions.

We fully recognize the arbitration award stayed all of Williams's remedies as a creditor of the partnership. How-

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[5] We note that in August 1993, while *Marsch I* was pending, the arbitration panel ordered a cash sale, which the then-incumbent receiver interpreted as permitting a credit bid by Williams but precluding a sale which involved any financing provided by the partnership. We stayed the sale proposed by the prior receiver pending disposition of *Marsch I*.

ever, in providing Williams with the right to payment upon sale and delaying payment of his obligation to the partnership until the sale, the arbitration award makes it equally clear the stay was intended only as a device to permit the receiver to conduct a sale and not as any reflection on the validity or priority of Williams's rights against the partnership.

We reject Marsch's additional contention that because the sale was not conducted as an execution sale under Code of Civil Procedure section 701.590, subdivision (b), which expressly permits credit bids by a judgment creditor at an execution sale, credit bidding should not have been allowed. As Williams points out, Code of Civil Procedure section 568.5 permits a receiver to sell property "in the manner prescribed" for execution sales. Moreover, we note that even in the absence of the fact Williams's claim had been reduced to a judgment, partners in dissolving corporations have been permitted to credit bid amounts they are owed by the partnership. (*Owen v. Cohen, supra,* 19 Cal.2d at p. 154.)

Finally, Marsch argues the credit bid submitted by Williams was unfair because it increased his potential liability for any deficiency owed to Williams by the partnership. We decline to consider or determine either the partnership's or Marsch's potential liability for a deficiency because neither Marsch nor Williams has obtained any ruling from the trial court with respect to deficiency liability. In the absence of a complete record on the deficiency issue, we are in no position to provide such a ruling at this point.

We note, however, the adverse impact of a deficiency on Marsch is not probative with respect to the price received at the sale and is not, in the end, very helpful in determining whether use of a credit bid was proper. In

the latter regard, we believe that it is self-evident that if a court eventually determines the deficiency issue in Marsch's favor, the use of a credit bid will not have increased his liability. On the other hand, if a court eventually determines the deficiency issue in Williams's favor, it will have to do so for reasons which tend to support, rather than undermine, use of a credit bid, i.e., a finding Williams's right to recover on his note is superior to any equitable or legal defense asserted by the partnership or Marsch.

In sum then, contrary to Marsch's arguments on appeal, he presented no proof in the trial court that the price Williams paid was grossly inadequate [6] or that the use of a credit bid was in any sense improper. Accordingly, we dismiss his appeal from the order denying his request for instructions to the receiver and affirm the order confirming the sale. Respondents to recover their costs of appeal.

/s/ Benke
BENKE, J.

WE CONCUR:

/s/ Kremer
KREMER, P.J.

/s/ McDonald
McDONALD, J.

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[6] Marsch has asked that we take judicial notice of pleadings Williams has filed in his own bankruptcy proceeding. Those pleadings indicate that in the very recent past Williams has found a buyer for the partnership property who is willing to pay, over time, approximately $50 million. Given the fluctuating nature of commercial real estate markets, these post-sale events have no bearing on the propriety of the 1996 sale and we deny Marsch's request that we take judicial notice of them.